No. 97-663-CSX Title: Newsweek, Inc., Petitioner
v.
Florida Department of Revenue, et al.

Docketed: October 15, 1997 Court: District Court of Appeal of Florida, First District

Entry	Date	Proceedings and Orders
	Oct 15 1997	Petition for writ of certiorari filed. (Response due November 26, 1997)
	Nov 3 1997	Order extending time to file response to petition until November 26, 1997.
	Nov 7 1997	Brief amicus curiae of Committee on State Taxation filed.
	Nov 14 1997	Brief amicus curiae of Tax Executives Institute, Inc. filed.
	Nov 26 1997	Brief of respondents Florida Department of Revenue, et al. in opposition filed.
	Dec 1 1997	Waiver of right of respondents Florida Department of Revenue, et al. to respond filed.
	Dec 8 1997	Reply brief of petitioner Newsweek filed.
	Dec 10 1997	DISTRIBUTED. January 9, 1998
	Jan 12 1998	REDISTRIBUTED. January 16, 1998
	Jan 20 1998	REDISTRIBUTED. January 23, 1998
	Feb 17 1998	PEDISTRIBUTED. February 20, 1998
	Feb 23 1998	Petition GRANTED. Judgment VACATED and case REMANDED Opinion per curiam.

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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NEWSWEEK, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS, and ROBERT F. MILLIGAN,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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PETITION FOR WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment of the United States Constitution require not only that the state provide a procedure under which taxpayers can obtain relief from an invalid tax but also that the state provide notice of the existence of that procedure when the tax is due in order for that procedure to satisfy the state's due process obligations?

2. Must a state, in order to meet its obligations under the due process clause, provide a procedure under which taxpayers can obtain relief from an invalid tax that fully protects taxpayers from all sanctions, including penalties and interest charges?

3. Is a refund statute which provides that the state "may" refund tax payments made when no tax was due—which, for more than fifty years, has been interpreted as *requiring* refunds for taxes paid when no tax was due—a remedy that may not constitutionally be withdrawn "midstream" after a taxpayer has paid taxes in anticipation of filing for a refund, under *Reich v. Collins*, 513 U.S. 106 (1994) and the due process clause?

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all of the parties to the appellate proceeding in the District Court of Appeal of Florida, First District, whose judgment is sought to be reviewed.

Newsweek, Inc., a wholly-owned subsidiary of The Washington Post Company, appellant below.

Department of Revenue of the State of Florida, appellee below.

Lawrence H. Fuchs, as Executive Director of the Department of Revenue of the State of Florida, appellee below.

Robert F. Milligan, as Comptroller of the State of Florida, appellee below.

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Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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PETITION FOR WRIT OF CERTIORARI

Petitioner Newsweek, Inc. respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the District Court of Appeal of Florida, First District, denying Newsweek meaningful backward-looking relief for payment of a tax imposed under a tax scheme that had previously been found to be unconstitutional.

OPINIONS BELOW

The order of the Supreme Court of Florida declining review is set forth in Appendix A. The opinion of the District Court of Appeal of Florida, First District, reported at 689 So. 2d 361 (Fla. Dist. Ct. App. 1997), is set forth in Appendix B. The judgment entered by the

Circuit Court in and for Leon County, Florida, is set forth in Appendix C. The order of the Florida District Court of Appeal, First District, denying rehearing, rehearing *en banc*, and certification of a question of great public importance, is set forth in Appendix D.

JURISDICTION

The District Court of Appeal of Florida, First District, issued its opinion on February 18, 1997, rejecting petitioner's claim under the due process clause of the Fourteenth Amendment of the United States Constitution that petitioner was entitled to a refund of a tax that had been found unconstitutional. Petitioner timely filed motions for rehearing, for rehearing *en banc*, and for certification of a question of great public importance. The District Court of Appeal denied these motions on March 27, 1997. Petitioner timely filed a petition for discretionary review in the Supreme Court of Florida. The Supreme Court of Florida denied the petition on July 17, 1997. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provision, the pertinent portion of which is set below:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This petition seeks review of a Florida court decision denying petitioner a refund of sales tax imposed by a Florida tax scheme that had been declared invalid as a violation of the First Amendment.

The Unconstitutional Tax

In 1988, Magazine Publishers of America, Inc., and several individual publishers, challenged a tax scheme imposing sales tax on magazines but not on newspapers as a violation of the First Amendment of the United States Constitution, asking for declaratory and injunctive relief. The Supreme Court of Florida upheld the trial court's judgment that the tax scheme was unconstitutional. *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992).[1] The court also granted injunctive relief by imposing the sales tax on newspapers. 604 So. 2d at 463-64. The injunction removing the content-based discrimination became effective December 9, 1990. App. 4a.[2]

The tax at issue, however, had been in effect since January 1, 1988. *See* Fla. Stat. §§ 212.08(7)(w), 212.05(1)(i) (Supp. 1988); App. 3a. No relief was expressly requested by Magazine Publishers of America for taxes due or paid during the almost three-year period between January 1, 1988 and December 9, 1990, nor was such relief provided by or discussed by the Supreme Court of

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[1] The Florida Supreme Court initially invalidated the tax scheme as an unconstitutional discrimination between types of media, a decision that was vacated and remanded by this Court for further consideration in light of *Leathers v. Medlock*, 499 U.S. 439 (1991). *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So. 2d 1304 (Fla. 1990), *vacated and remanded*, 499 U.S. 972 (1991). On remand, the Florida Supreme Court found the tax scheme unconstitutional because the Department of Revenue distinguished between magazines and newspapers on the basis of their content. *Magazine Publishers of America*, 604 So. 2d at 462-63.

[2] The timing appears to reflect the effective date of the injunction issued by the Florida Supreme Court in its initial decision in the case. *See Magazine Publishers of America*, 565 So. 2d 1304, 1310-11 (determining that the appropriate remedy was to strike the exemption for newspapers and ordering its decision to become final 90 days after issuance of mandate). That decision issued May 31, 1990. Rehearing was denied September 10, 1990. Thus, 90 days after issuance of mandate was December 9, 1990.

Florida. *See Magazine Publishers of America,* 604 So. 2d 459.

The Refund Proceedings

Newsweek followed the method then recognized in Florida for challenging an unlawful tax. It paid the tax, then timely filed a claim with the Department of Revenue for a refund of tax paid between January 1, 1988 and December 9, 1990, App. 4a, pursuant to Section 215.26, Fla. Stat., App. 15a-16a. Had Newsweek failed to pay the tax to the Department of Revenue, under Florida law as then interpreted, Newsweek would have been subject to an automatic penalty set at 25 percent of the tax due, Fla. Stat. Section 212.12(2)(a), interest at a rate of 1 percent per month, Section 212.12(3), seizure and sale of its property to satisfy the amount due, Section 212.15(4), and cancellation of its sales tax license (and therefore the right to sell magazines), Section 212.18(3).

After the Department of Revenue denied a refund, Newsweek filed suit in circuit court claiming, *inter alia,* that denial of a refund violated the due process clause of the United States Constitution. App. 4a. Newsweek asked for summary judgment on its due process claim, which was denied. The Department of Revenue asked for summary judgment as to all claims, which was granted. App. 11a. Newsweek appealed the decisions rejecting its due process claim to the District Court of Appeal. App. 4a.

The District Court of Appeal affirmed the trial court's decision. The court interpreted Fla. Stat. Section 72.011 (1987) to provide a predeprivation remedy permitting taxpayers to challenge taxes in advance by paying contested taxes into the registry of the court. App. 5a. Therefore, the court held, the state was not required by the federal due process clause to grant a refund under its refund statute, Fla. Stat. Section 215.26. App. 5a-7a. One of the three judges concurred on the additional ground that retroactive application of the decision in

Magazine Publishers of America was not required in a subsequent case, and that equitable considerations justified the denial of retroactive relief. App. 8a-9a. Another judge concurred on the "narrow ground" that Section 72.011 and another statute, Section 120.575, taken together provided an adequate predeprivation procedure. App. 9a.[a]

Newsweek moved for rehearing, rehearing *en banc,* and certification to the Supreme Court of Florida on the ground that Section 72.011 did not provide "a clear and certain remedy," as required by the due process clause, because that section had not previously been declared or understood to be available to taxpayers before they received a final *assessment,* and on the further ground that Florida was required under *Reich v. Collins,* 513 U.S. 106 (1994), to honor the refund statute it had held out to taxpayers when they paid their taxes. Newsweek Mot. for Reh'g, Reh'g *en banc,* and Certification at 4-5, 9. The District Court of Appeal summarily denied all three motions on March 27, 1997. App. 12a.

Newsweek petitioned the Supreme Court of Florida for discretionary review on the ground that under the court of appeal's decision Florida had not satisfied the requirements of due process delineated in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco Dept.,* 496 U.S. 18 (1990), and *Reich v. Collins.* Newsweek Pet'n

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[a] Fla. Stat. Sections 72.011, 215.26, and 120.575 (1987) are set forth in Appendix E. These are the statutes that set forth procedures to challenge unlawful taxes in 1988, and with inconsequential wording changes, through December 1990, during which the tax in question was due. The state legislature has made some revisions since that time, none of which is material to the instant case. In 1991, the legislature expressly made Section 72.011 available for judicial review of refund denials, as well as for review of assessments, with revisions to Section 215.26 reflecting that change. *See* Fla. Stat. Sections 72.011, 215.26 (1996). Section 120.575 was recodified at § 120.80(14)(b) in 1996.

for Review at 8-9. The Department of Revenue opposed review on the ground that prospective-only relief was appropriate for the unconstitutional tax. The Department also argued that the process provided by the state permitting a taxpayer to decline to pay tax, wait until a final assessment for delinquent taxes was issued and then challenge that assessment for delinquent taxes fully satisfied the due process clause, and therefore no additional refund remedy was required. Fla. Opp. at 6-9. The Supreme Court of Florida declined review July 17, 1997. App. 1a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the decision below represents another instance of Florida's continuing resistance to the constitutional requirements constraining a state's freedom to retain unlawful tax revenues, delineated in governing precedents of this Court. The extraordinary recalcitrance of the Florida courts in this area argues strongly that the writ should be granted to reverse the decision below, in order to ensure respect for the requirements of the due process clause and this Court's determinations of law.

In the alternative, if this Court does not conclude that *McKesson* and *Reich v. Collins* require reversal of the decision below, certiorari should be granted in order for the Court to address those questions the Court finds were not resolved by its previous decisions in this area. The scope of the due process right recognized in *McKesson* and the applicable constitutional standards by which to judge the adequacy of the procedures provided to obtain relief from an unlawful tax are issues of considerable importance that have led to continuing confusion in the state courts. Some state courts have accorded cramped readings to *McKesson*, permitting those states to retain unlawful tax revenues.[4] Other state courts have denied

[4] *See, e.g., PIA New Jersey, Inc. v. Director, Division of Taxation*, 13 N.J. Tax 94, 101 (1993) (no retrospective remedy required under *McKesson* for tax violating First Amendment); *Dryden v. Madison County.*, 696 So. 2d 728 (Fla. 1997) (no retrospective remedy required under *McKesson* where unlawful tax was not discriminatory).

relief based on new requirements imposed years after the taxes were paid.[5] Taxpayers are also stymied whenever, unguided by any prior state court decisions, they choose a seemingly available procedure, only to have the state court later determine they should have chosen a different one.[6]

State courts evidently understand that *McKesson* mandates some process permitting taxpayers to protect their property from confiscation under the auspices of an unlawful tax, at least for taxes virtually identical to the one at issue in *McKesson* itself. *See Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) (ordering refund of tax invalid under the commerce clause). Too many states, however, including Florida, have not interpreted the due process clause, or this Court's decisions, to re-

[5] *See, e.g., General Motors Corporation v. Kansas City*, 895 S.W.2d 59 (Mo. Ct. App. 1995) (denial of refund for taxes paid for years 1985 through 1988 based on question of first impression decided in 1994), *cert. denied*, 116 S. Ct. 277 (1995); *Kerr v. Waddell*, 916 P.2d 1173, 1178-79 (Ariz. Ct. App. 1996) (denying relief for taxes paid for years 1984 through 1988 for lack of compliance with requirement made applicable in 1996).

[6] *Compare James B. Beam Distilling Co. v. Georgia*, 437 S.E.2d 782, 785 (Ga. 1993) (relief under state refund law not required under *McKesson* because state provided process for challenging final assessment), *cert. denied*, 513 U.S. 1056 (1994), *with PIA New Jersey*, 13 N.J. Tax at 102 (relief from unlawful tax inappropriate in assessment proceeding because state provided refund procedure); *compare James B. Beam Distilling Co. v. Georgia*, 437 S.E.2d at 785 (refund not required because state provided general declaratory judgment proceeding), *with St. Ledger v. Kentucky Revenue Cabinet*, 942 S.W.2d 893, 900-01 (Ky.) (no relief in general declaratory judgment proceeding required because state provided refund procedure), *cert. dismissed*, 1997 U.S. LEXIS 4425 (Sept. 22, 1997).

quire any notice to taxpayers about what process is available to protect their rights. Similarly, certain state courts have not interpreted the due process clause, or this Court's decisions, to require procedures for obtaining relief from unlawful taxes that fully protect taxpayers from financial sanctions. The decision below would be an excellent vehicle for this Court to address these critical components of due process rights in an area that has been, and can be expected to remain, of recurring interest through the country.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS AND SHOULD BE REVERSED.

The Florida court of appeal gave this Court's decision in *McKesson* an impermissibly cramped reading and wholly ignored this Court's decision in *Reich v. Collins* in reaching its decision to deny meaningful backward-looking relief to Newsweek for payment of taxes under an acknowledgedly unconstitutional tax scheme. Florida's history of evading its obligations under the due process clause in this area, a history that continues in other cases as well as the decision at issue, demonstrates that the decision below is not merely an isolated error. Certiorari is appropriate here in order to ensure respect for this Court's decisions and to secure the rights guaranteed by the due process clause of the Fourteenth Amendment in those states that continue to resist their obligations under the United States Constitution.

A. The Predeprivation Remedy Relied On By The Court Below Was Not "Clear and Certain" As Required By *McKesson*.

In *McKesson*, this Court made clear that the due process clause not only requires states to provide taxpayers with an opportunity to challenge the legal validity of a tax, but also requires them to provide taxpayers "with 'a clear

and certain remedy' for any erroneous or unlawful tax collection." *McKesson*, 496 U.S. at 39 (quotation and citation omitted). The decision below is premised on the understanding that the due process clause is satisfied if the state provides a procedure for obtaining relief from an unlawful tax, whether or not taxpayers should reasonably have known about that procedure when the state required them to pay the tax. This view reads the notice requirement out of the due process clause altogether, and is irreconcilable with *McKesson*'s stricture that the remedy provided be "clear" and "certain."

The court below relied on a procedure to satisfy the state's due process obligations that was theretofore wholly unknown. *See* Robert S. Goldman, "Florida *Newsweek* Decision Clouds Taxpayer Refund Rights," CCH *State Tax Review* 12, 13 (July 14, 1997) ("The remedy identified by the First District is not exclusive, clear, or certain. Prior to the *Newsweek* decision, it did not exist."). Indeed, the court's ruling that Newsweek could have used that procedure was even inconsistent with prior interpretations of Section 72.011. *See, e.g., Florida Export Tobacco Co. v. Department of Revenue*, 510 So. 2d 936, 942 (Fla. Dist. Ct. App. 1987).

Specifically, the court below determined that Newsweek should have made use of the statutory remedy provided in Section 72.011 to challenge the sales tax when it was due. That statute expressly provided an opportunity for taxpayers to contest the legality of a *final assessment* for delinquent taxes by filing an action in circuit court after paying the disputed tax into the court's registry or posting a bond. The statute alternatively permitted taxpayers to contest a final assessment by petitioning the Department of Revenue under Section 120.575. App. 13a, 16a-18a. It did not by its terms authorize or even mention challenges to a tax when due, or at any time before a final assessment for delinquent tax is issued by the Department, and no prior decisions authorized such a challenge pur-

suant to that statute. Significantly, the Department of Revenue's regulations themselves referred only to challenges to final assessments. *See, e.g.*, Fla. Admin. Code. R. 12-6.003, 12-6.0033, 12-6.004 (1987).

Thus, the court of appeal's interpretation of Section 72.011 as providing a procedure for challenging a tax when due, but before any assessment, was unprecedented and unanticipated. No language in the statute suggested such a procedure was available. The agency charged with implementing the tax laws did not consider such a procedure available. Nothing in Florida law would have alerted a reasonable taxpayer to the possibility that such a procedure was available. There is of course no doubt that the power to interpret a state statute to provide a not previously recognized method of challenging tax laws is entirely within the province of the state courts. The power to deny relief on that basis for unlawful taxes paid earlier, however, is not.

As *McKesson* made clear, the due process clause requires that the opportunity to contest the tax must be a meaningful one. 496 U.S. at 39. A procedure that was not clear and certain at the time the taxpayer was obligated to choose a procedure through which to protect itself against unlawful taxes—*i.e.*, when the tax was due, and the state's full power to impose sanctions could be brought to bear—cannot satisfy the state's due process obligations. If states could rely on previously unknown procedures for challenging unlawful taxes to deny relief under other procedures, they would free themselves altogether from the obligation to return unlawfully imposed taxes. The ability of states to retain unlawful taxes would be limited only by their court's ability to detect new procedures in statutes and regulations or to invent such procedures as a matter of state common law. Florida law, as interpreted by the court below, does not provide the "fair opportunity" to obtain a remedy that *McKesson* found required by the due process clause. 496 U.S. at 39. Indeed, the decision

below places taxpayers in precisely the position *McKesson* prohibited.

B. Denial Of A Refund Remedy Was An Unconstitutional "Bait And Switch" Under *Reich v. Collins*.

The court below also ignored this Court's decision in *Reich v. Collins*, which explained that states could not reconfigure their tax schemes mid-course, by holding out an apparently clear and certain remedy when unlawful taxes were due and then declaring that remedy unavailable after the taxes were paid. 513 U.S. at 108-09. Florida, however, has done just that.

Florida has long held out a generally available refund procedure. *See* §215.26; App. 15a-16a; *see also McKesson*, 496 U.S. at 24 n.4, 38-39. The statute was first adopted in 1943, *see* 1943 Fla. Laws ch. 22008, Section 1, and has remained in effect since. Florida courts have long interpreted the provision to be an unequivocal declaration of state policy to make complete restitution to any taxpayer who pays tax when no tax is due. *See Walgreen Drug Stores Co. v. Lee*, 28 So. 2d 535 (Fla. 1946); *State ex rel. Hardaway Contracting Co. v. Lee*, 21 So. 2d 211 (Fla. 1945) (refund of unconstitutional tax).

Nothing in the statute suggests that the refund remedy provided does not apply if a challenge under Section 72.011 (or any other procedure) is available. Moreover, Florida courts have continued to interpret the statute to require refunds even after Section 72.011 or its predecessors [7] were enacted for taxes to which Section 72.011 or its predecessors were applicable. *See, e.g., Greyhound Lines, Inc. v. Department of Banking and Finance*, 443 So. 2d 162 (Fla. Dist. Ct. App. 1983); *Miller v. Agrico Chemical Co.*, 383 So. 2d 1137 (Fla. Dist. Ct. App. 1980); and *Exxon Corp. v. Lewis*, 371 So. 2d 129 (Fla. Dist.

[7] *See, e.g.*, Fla. Stat. § 26.012 (1975) (providing circuit courts with jurisdiction to hear challenges to tax assessments).

Ct. App. 1978). Instead, taxpayers could choose between waiting for a final assessment and challenging that assessment under Section 72.011, or paying the tax and obtaining a refund under Section 215.26.

Thus, Florida had held out "what plainly appears to be a 'clear and certain' postdeprivation remedy" in the form of its tax refund procedures, "and then declared, only after [Newsweek] and others had paid the disputed taxes, that no such remedy" was available. *Reich v. Collins*, 513 U.S. at 106. Even if taxpayers should have anticipated that Section 72.011 might be interpreted to provide an opportunity to challenge an unconstitutional tax before a final assessment was received, "no reasonable taxpayer would have thought that [this] represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes." *Id.* at 106-07 (emphasis added).

Under *Reich v. Collins*, Newsweek was constitutionally entitled to the refund remedy Florida had long provided. Although Newsweek squarely relied on *Reich v. Collins*, the court below utterly ignored that decision, without explanation. App. 2a-9a.

C. The Decision Below Is Not Merely An Isolated Error of Law.

Although this Court does not undertake to correct every misunderstanding of law, the errors below are not isolated mistakes. Florida's continuing hostility toward its obligation to remedy unlawful taxes under the due process clause ensures that the injustice of the decision below will reoccur repeatedly in the future. As this Court knows, *McKesson* itself was a Florida case accepted for certiorari because the Supreme Court of Florida, although acknowledging that the taxes at issue were unconstitutional, had refused on equitable grounds to order relief for those forced to pay them. 496 U.S. at 22. The tax itself also

reflected a less than respectful posture toward constitutional obligations. Florida had imposed a tax that was virtually identical to the tax found unconstitutional in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *McKesson*, 496 U.S. at 46. In response to *Bacchus*, the Florida legislature made "only cosmetic changes" and continued to enforce the patently unconstitutional tax scheme. *Id.* Nonetheless, one of the equitable reasons relied on by the Florida Supreme Court to deny relief was the State's alleged good faith in imposing the tax.[8]

Only five months ago, the Supreme Court of Florida determined that taxpayers forced to pay an admittedly unlawful tax had no right to relief because *McKesson* did not apply "[w]here an invalid tax scheme applies across the board and confers a commensurate benefit." *Dryden v. Madison County*, 696 So. 2d 728, 730 (Fla. 1997). In the Supreme Court of Florida's view, under *McKesson* only "discriminatory" taxes require meaningful backward-looking relief. *Id.* at 729. Thus, having confined *McKesson* to its precise facts, the Florida court found that equitable considerations governed the availability of relief from the unlawful tax at issue. *Id.* at 730. The court then decided that the government had acted in good faith in imposing the tax and held that no relief was due. *Id.*

Two months later, the Supreme Court of Florida declined to review the decision below, which denied relief

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[8] This Court's reversal of the Supreme Court of Florida's decision to provide only prospective relief was never implemented. The liquor tax was never imposed retrospectively on those unconstitutionally exempted, and those who paid the tax were never issued refunds. McKesson itself settled with the State. *See Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 643 So. 2d 16, 17 (Fla. Dist. Ct. App. 1994), *cert. denied*, 514 U.S. 1083 (1995). Another plaintiff in the *McKesson* case was denied backward-looking relief under the Supreme Court of Florida *McKesson* decision reversed by this Court because that plaintiff had not petitioned for certiorari or joined McKesson's petition. *Id.* at 20.

under a long-standing refund statute for Newsweek's payment of tax under an unconstitutional tax scheme. As discussed above, the ground for denying relief was that Newsweek should have availed itself of a different procedure instead, a procedure recognized for the first time in that very decision.

In view of this history, this Court's review is critical so that those subject to Florida taxes, and taxes in other states with similar inclinations, will be able to enjoy the due process rights guaranteed by the United States Constitution.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTIONS LEFT OPEN BY THE COURT'S EARLIER DECISIONS REGARDING THE NOTICE AND PROTECTION FROM SANCTIONS NECESSARY TO COMPORT WITH DUE PROCESS.

If this Court finds that its earlier decisions do not resolve all issues in this case, it should grant the petition in order to address the questions it finds left open by its prior decisions. For example, if the adequacy of the pre-deprivation remedy recognized by the court below is not governed by *McKesson*, this Court should grant certiorari in order to answer the significant questions presented as to what constitutes a "clear and certain" remedy. Further, if Florida's power to withdraw its refund remedy is not governed by *Reich v. Collins* because the Florida refund law is phrased differently than Georgia's, certiorari should be granted to determine whether the due process clause permits "bait and switch" when the remedy withdrawn is similar to Florida's. This Court's clarification of the scope of taxpayers' due process right to obtain relief from unlawful tax laws, and the nature of the obligations it imposes on states, is urgently needed, particularly for those states, like Florida, that appear predisposed to construing the Court's earlier determinations extremely narrowly.

A. Is A Procedure For Obtaining Relief From An Unlawful Tax "Clear and Certain" If Taxpayers Had No Notice That Procedure Was Available At The Time the Tax Was Due?

This Court has made clear that states must provide a "clear and certain" process by which taxpayers may obtain relief from unlawful taxes in order to satisfy the due process clause. *McKesson*, 496 U.S. at 32, 39, 40, 43, 51. The court below, however, plainly did not understand that directive to mean that the process must be clear and certain *at the time the tax was due*. As explained earlier, the court below found that Florida met its due process obligations by providing a procedure that court "discovered" for the first time in considering its decision in this case. Until this decision, issued in 1997, the availability of such a procedure was unknown to the state's courts, to its Department of Revenue and to its taxpayers. *See, supra*, pp. 9-10.

Those obligated to pay the tax, beginning in January 1988, would reasonably only have known they had a choice between waiting for the Department of Revenue to issue an assessment, with attendant interest and penalties, or applying for a refund after paying the tax. They had no notice in 1988, either by the terms of the statute, its judicial interpretations, or the regulations implementing it, that Florida law would be interpreted to permit them to challenge the tax under Section 72.011 before receiving a final assessment.[9]

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[9] One of the judges below relied on the additional availability of a different statute, Fla. Stat. Section 120.575 (1987), which provided that taxpayers could petition the Department of Revenue as an alternative to challenging a tax in circuit court. App. 9a. However, that provision also had not been considered available for challenges to unlawful taxes when they were first due, and appeared by its terms to be limited to challenges to final assessments for delinquent taxes. App. 16a-18a. In addition, administrative hearing officers had not previously been found to have jurisdiction to hear

The adequacy of a previously unknown predeprivation procedure was one of the questions this Court expressly left open in *Reich v. Collins*, deciding instead to rest its decision on other grounds. *See Reich v. Collins*, 513 U.S. at 111 (the "constitutional adequacy of these [predeprivation] procedures [is] an issue on which we express no view"). This important question is again squarely presented by the decision below.

If state courts are provided no guidance on this issue, they will in effect be handed a loophole large enough to swallow the entire rule established in *McKesson* and the long line of decisions on which *McKesson* relied. As long as notice to taxpayers of the appropriate procedure is not required *at the time the tax is due*, taxpayers will be at the mercy of state courts with the power to determine new rules. Theoretically, a determined state court system could ensure that no relief is ever actually provided, by repeatedly inventing new procedures or requiring new prerequisites.[10] At best, different federal due process rights are likely to be observed in different states, or even in different courts, with results that are erratic, unfair, and beyond the power of taxpayers to affect.

This Court's review is needed to further elucidate the principles announced in *McKesson* and its progeny, and to achieve uniform enforcement of constitutional rights.

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constitutional challenges to a tax. *See Don's Sod Co. v. Department of Revenue*, 661 So. 2d 896 (Fla. Dist. Ct. App. 1995) (hearing officers have no jurisdiction to consider constitutional issues).

[10] *See also General Motors Corporation*, 895 S.W.2d 59 (denying refund for taxes paid in the 1980s based on 1994 decision that state tax protest requirement was also applicable to relief for municipal license tax) (Missouri); *Kerr v. Waddell*, 916 P.2d at 1178-79 (relief not available for taxes paid 1984 through 1988 based on 1996 decision requiring exhaustion of administrative remedies for declaratory judgment action) (Arizona). The state courts inclined to deny relief based on subsequent law are clearly not limited to Florida and Georgia.

B. Does A Procedure Comport With Due Process If Taxpayers Contesting A Tax As Unlawful May Be Subject To Any Financial Sanctions?

The procedure recognized by the court below as adequate does not necessarily protect taxpayers from interest payments or even penalties if the tax is upheld. By its terms, the procedure applied only to challenges of final assessments for delinquent taxes issued by the Department of Revenue. App. 13a-15a. Such assessments include penalties and interest from the date the tax was due. The court of appeal held that the procedures set forth in that statute could also be used to challenge unlawful taxes as soon as they were due, without waiting for an audit and final notice of deficiency. App. 6a. The court found that any taxpayer could follow the procedures specified in that statute, paying the amount of the contested tax into the registry of the court or posting a bond, as a prerequisite to challenging the validity of the tax. App. 6a-7a.

The court also explained that a "taxpayer cannot reasonably be considered liable for *penalties* for availing himself of the procedure provided in chapter 72" (emphasis added), citing only a concurring opinion in another case. App. 7a. To the extent the court was interpreting Section 72.011 rather than merely predicting the judgment of others in the future, this suggests that taxpayers would not be subject to penalties for challenging the validity of a tax law under this procedure. The court's statement, however, remains worrisome for its failure to make clear that not only would it be unreasonable to hold such a taxpayer liable for penalties, it would be contrary to law.

Moreover, the court did not hold or even suggest that taxpayers would be protected from *interest* charges accruing during the pendency of such a challenge. And, indeed, the procedure provides no guaranteed protection from interest charges. Under Florida law the clerk of the court has discretion to place the funds in an interest-bearing account or a non-interest bearing account. Fla. Stat., Sec-

tion 28.33; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); App. 7a. The court did not hold that the clerk was required to place the funds in an interest-bearing account, nor did it hold that interest charges could not be imposed on taxpayers availing themselves of this procedure. Thus, the procedure the court below found constitutionally adequate provides no protection to the taxpayer against mounting interest charges, even though the taxpayer has no control over the funds during the proceedings. Indeed, whether the funds are permitted to earn interest to satisfy or at least offset any interest charges is uniquely within the unfettered discretion of the state.[11]

The court of appeal's reliance on other mechanisms available to the taxpayer does not alleviate the taxpayer's vulnerability to this financial sanction. For example, the taxpayer can file a cash bond or surety bond, App. 7a, which in itself is expensive, and also does not relieve the taxpayer of interest charges. In addition, the taxpayer can "seek a court order approving an alternative arrangement" or seek "a waiver from the Department [of Revenue] of the obligation to pay the contested tax into the registry of the court" or "file a motion for court approval of an alternative security arrangement," App. 7a—all mechanisms entirely within the discretion of the state to permit or withhold.[12]

[11] If the clerk does place the funds in an interest-bearing account, the accrued interest belongs to the taxpayer. App. 6a. Thus, if the accrued interest is sufficient to cover the statutory interest due the Department of Revenue if the tax is upheld, the taxpayer is protected. However, the interest rate paid to the taxpayer is determined by commercial banks; the interest rate charged for delinquent payment is, again, entirely within the discretion of the state, and has been 12 percent per year at all times relevant to this petition. *See* Fla. Stat. § 212.12(3).

[12] The alternative measure for challenging the tax before paying it to the Department of Revenue that provided the basis for one judge's concurrence, § 120.575, also afforded no protection to tax challengers from mounting interest charges or penalties. App. 17a.

This Court's guidance is needed to address whether the due process clause requires states to provide a process that permits taxpayers to challenge the legal validity of a tax *without incurring any financial sanctions*, including interest and penalties. Further instruction is needed with respect to whether a state's discretion to waive sanctions is constitutionally sufficient, or whether protection from financial sanctions under these circumstances must be unconditional.[13]

C. What Constitutes Holding Out A Remedy Such That Withdrawal Of That Remedy Is An Unconstitutional Bait And Switch?

This Court has held that a state holding out a refund remedy to taxpayers may not withdraw that remedy after the taxes have been paid, at least when the refund statute is mandatory. *Reich v. Collins*, 513 U.S. at 111 (noting that the Georgia refund statute provided that the State " '*shall*' refund '*any and all*' taxes or fees which are determined to have been erroneously or *illegally assessed* and collected from' a taxpayer") (emphasis added). The Florida refund statute is not quite identical. It provides that the "Comptroller of the state *may* refund to the person who paid same . . . [a] payment where no tax . . . is due." § 215.26(1) & (1)(b) (emphasis added); App. 15a.

As discussed earlier, despite the discretionary language, Florida courts had long interpreted the provision to require refunds to taxpayers who paid tax when no tax is due, both before and after Section 72.011 was enacted. *See, supra*, pp. 11-12. Further, no language in the statute

[13] *See also James B. Beam Distilling Co. v. Georgia*, 437 S.E.2d at 785-86 (procedure for challenging final assessment for delinquent taxes satisfies due process notwithstanding imposition of interest and waiver of penalties solely within discretion of Commissioner; procedure for declaratory judgment satisfies due process even though protection from both interest and penalties requires discretionary decisions by both court and Commissioner).

or its implementing regulations suggests any exception to the availability of the refund remedy. And no court decisions, before the decision below, suggested that refunds would not be available when Section 72.011 provided an alternate remedy.

At least one state determined that a refund remedy couched in virtually identical language may *not* be withdrawn from taxpayers after they have paid their taxes if it has historically been interpreted to require restitution to taxpayers. *See Harper v. Virginia Dep't of Taxation*, 462 S.E.2d 892 (Va. 1995). The state tax department had argued that *Reich v. Collins* did not apply because the statutory language was discretionary. *Id.* at 896. But the Virginia court relied on the state's long history of interpreting the statute to require refund of taxes illegally collected to conclude that it could not constitutionally withdraw that relief after taxpayers had paid the unlawful tax. *Id.* at 897-98. The decision below is in conflict. The court of appeal did not find *Reich v. Collins* dispositive, although it declined to explain why.

Thus, despite the principles set forth in *Reich v. Collins*, open questions apparently remain. What notice must be provided to taxpayers that a long-standing procedure for obtaining relief will no longer be available? Does the answer to that question turn on whether the relief was discretionary? If it does, what factors should a court consider in determining whether the relief was discretionary? Direction from this Court is necessary to ensure uniform understandings of constitutional obligations in this area and appropriate protection of taxpayers in all states.

D. Is Retrospective Relief Required For Payors Of An Unlawful Tax When the Plaintiffs Who Initially Established The Invalidity Of The Tax Received Prospective Relief Only?

In the past decade, this Court has repeatedly addressed and significantly clarified the jurisprudence of retroactivity

in both the criminal and civil areas.[14] This Court has held that it will ordinarily apply new rules of law retroactively. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). It has rejected selective retroactivity, finding that its retroactive application of a federal rule requires every court to give retroactive effect to that decision in pending or future cases, because similarly situated litigants must be treated similarly. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (civil rule); *Griffith v. Kentucky*, 479 U.S. 314 (1987) (criminal rule). Further, this Court has explained that the freedom of states to fashion the relief required by retroactive application of a new rule is limited by their obligation to actually provide such relief. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

A key question this Court has not yet decided however, is if—or when—courts may apply new rules prospectively only. At least one member of the current Court has written that courts do not have the power to apply rules prospectively only. *See, e.g., James B. Beam*, 501 U.S. at 548-49 (Scalia, J., concurring). Another member of the current Court has concurred on this point, but suggested that courts in certain circumstances have equitable powers to fashion relief which may preclude a new rule—although applied retroactively—from having any retroactive effect, such as the power to toll statutes of limitation. *See American Trucking*, 496 U.S. at 222 (Stevens, J., dissenting).

The cases before this Court, however, have thus far presented the Court either with questions of retroactive relief sought by the litigants in the initial challenge to the

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[14] *See, e.g., Griffith v. Kentucky*, 479 U.S. 314 (1987); *American Trucking Ass'ns., Inc. v. Smith*, 496 U.S. 167 (1990); *McKesson*, 496 U.S. 18 (1990); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

law at issue, such as *Lampf, Pleva* and *McKesson*, or with questions of retroactive relief when previous litigants had already obtained such relief, such as *James B. Beam, Harper*, and *Reynoldsville Casket*. In contrast, the instant case involves an important situation not yet addressed by this Court—the rights of litigants to retrospective relief when the litigants initially establishing the invalidity of a tax did not receive such relief.

Here, the litigants who initially challenged the tax at issue received only prospective relief. It is not wholly clear from the record whether they only sought prospective relief or whether such relief was all the Supreme Court of Florida was willing to grant. That court's opinion does not discuss the question and the otherwise successful litigants did not press their claims further.[15]

Thus, Newsweek's claim for meaningful backward-looking relief stands without the additional pillar of such relief having been afforded to similarly situated litigants, and raises the important open questions of the power of courts to apply rules prospectively only, when there are no concerns about uniform application of law. It presents, therefore, a good opportunity for the Court to address this important question which, although not squarely presented by the decision below, is clearly prefigured as an issue on remand by Judge Davis' concurrence.[16]

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[15] The complaint simply asked for a declaratory judgment that the tax statute was void as unconstitutional and a preliminary injunction restraining collection of the tax. Compl. of Magazine Publ. of America, *et al.*, Civ. No. 88-2442, Cir. Ct., 2d Cir., Leon County (July 7, 1988).

[16] The majority below did not address this question; it either found an obligation to apply the *Magazine Publishers of America* rule retroactively or assumed the obligation without deciding. Judge Davis, as discussed above, wrote separately to express her view that "a valid alternative basis" for denying relief here was that equitable considerations determined whether retroactive application of the *Magazine Publishers of America* rule was appropriate, and those considerations do not justify retroactive application of "refund actions brought by taxpayers who were not parties to the *Magazine Publisher* suit" because the constitutional decision would not necessarily have been anticipated. App. 8a-9a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

Case No. 90,431

District Court of Appeal,
1st District—No. 96-1882

NEWSWEEK, INC.,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, *et al.*,
Respondents.

Thursday, July 17, 1997

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 96-1882

NEWSWEEK, INC.,
Appellant,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS and ROBERT F. MILLIGAN,
Appellees.

Opinion filed February 18, 1997

An Appeal from the Circuit Court for Leon County
Judge William Gary

BARFIELD, C.J.

Newsweek, Inc., appeals a final order in which the circuit court denied Newsweek's motion for summary judgment and granted the cross-motion for defendants Lawrence H. Fuchs, as Executive Director of the Department of Revenue, Robert F. Milligan, as Comptroller of the State of Florida, and the Florida Department of Revenue (collectively referred to as the Department), thereby denying Newsweek's request for a tax refund. Because we find no due process violation in the State's failing to provide a refund or other retroactive relief where Newsweek had an adequate predeprivation remedy, we affirm.

Effective July 1, 1987, the Legislature imposed a sales tax on newspapers and magazines. § 212.05(1)(i), Fla. Stat. (1987). Beginning January 1, 1988, the Legislature exempted newspapers from that tax. § 212.08(7)(w), Fla. Stat. (Supp. 1988). The retail sale of magazines remained subject to sales tax under section 212.05(1)(i), Florida Statutes (Supp. 1988). Magazine Publishers of America, Inc. (an association of which Newsweek is a member), and several individual publishers (but not Newsweek individually) challenged the constitutionality of this tax scheme. The trial court held the tax scheme unconstitutional, and that portion of the trial court's order was affirmed by the Florida Supreme Court in *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So. 2d 1304 (Fla. 1990), *cert. granted, judgment vacated sub nom. Miami Herald Pub. Co. v. Florida Dep't of Revenue*, 499 U.S. 972 (1991). In its first opinion, the Florida Supreme Court held the relevant portions of chapter 212 invalid as violative of the First Amendment of the United States Constitution because it unconstitutionally differentiated between magazines and newspapers. The trial judge also ruled with Magazine Publishers that the appropriate remedy for this unlawful taxing scheme was to extend the exemption allowed newspapers by section 212.08(7)(w) to magazine publishers. The Supreme Court reversed that portion of the order, and ruled that the appropriate remedy was to strike the exemption enjoyed by newspapers and to apply the tax evenly. The United States Supreme Court granted certiorari and vacated the judgment for reconsideration in light of *Leathers v. Medlock*, 499 U.S. 439 (1991), in *Miami Herald Pub. Co. v. Department of Revenue*, 499 U.S. 972 (1991). On remand, the Florida Supreme Court again held the taxing scheme unconstitutional in *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992), affirming the ruling that the taxing scheme unconstitutionally violated the First Amendment because the discrimination between newspapers and magazines

was content-based, but reversing the trial court's order to the extent that it held that magazines were entitled to the same exemption as newspapers. Again, the Florida Supreme Court explained that the Legislature had indicated its intent that the tax should be imposed and that, if there was any invalidity in the taxing scheme, the exemption should fall rather than the tax. The Department has taxed both newspapers and magazines since December 9, 1990. *See* Fla. Admin. Code R. 12A-1.008(1)(a)(1994).

Newsweek filed a timely claim for a refund of sales tax paid between January 1, 1988, and December 9, 1990. That refund claim was denied on February 26, 1995. Newsweek then filed an action in circuit court, seeking the refund. Relying upon the holding of the Florida Supreme Court in *Florida Dep't of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992), Newsweek's complaint alleged that the imposition of sales tax on magazines but not upon newspapers in the period between January 1, 1988, and December 9, 1990, was unconstitutional. Count I of the complaint claimed that Newsweek was entitled to a refund of sales tax paid in that interim under the Due Process Clauses of the United States and Florida Constitutions. Count II claimed that the denial of the refund violated section 1983 of Title 42 of the United States Code.[1] Newsweek moved for summary judgment on the basis of Count I only, asserting that Due Process required retroactive relief as a matter of law. That motion was denied.

We must affirm if the trial court was correct for any reason. As the Florida Supreme Court explained in *Chase v. Cowart*, 102 So. 2d 147, 150 (Fla. 1958):

[1] Newsweek has not appealed the circuit court's order granting summary judgment as to Count II. *See Witmer v. University of Florida Police Department*, 610 So. 2d 87, 88 (Fla. 1st DCA 1992) (affirming order granting motion to dismiss "to the extent it dismisses the section 1983 action against the state and its officers sued in their official capacity").

> Decrees and judgments in cases which come to an appellate court for review are presumed to be correct and free from error. We are required to uphold the lower court if valid grounds exist therefor. While the grounds or reasoning used by the trial court or chancellor are frequently helpful to an appellate court on review, they are not controlling. The decision of the appellate court must be made, not on the basis of whether the trial court or chancellor traveled the proper route, used proper reasoning, or laid his conclusion on proper grounds, but rather on whether his conclusion is correct or incorrect.

See also DSA Group, Inc. v. Gonzalez, 555 So. 2d 1234 (Fla. 2d DCA 1989); *Whitney v. State*, 184 So. 2d 207, 209 (Fla. 3d DCA) (applying "doctrine that even if the wrong reasons were given [but] the right result was obtained, the order here under review should be affirmed"), *cert. denied mem.*, 192 So. 2d 490 (Fla. 1966), *cert. dismissed*, 389 U.S. 138 (1967).

The trial court correctly ruled that Newsweek is not entitled to a refund under the Due Process Clauses of the United States and Florida Constitutions. Newsweek relies upon the holding in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 (1990) that the Due Process Clause requires "meaningful backward-looking relief" when a taxpayer is forced to pay a tax before having an opportunity to establish the unconstitutionality of that tax. Below the Department contended that *McKesson* is distinguishable because, while the liquor taxes at issue in *McKesson* were not encompassed within the procedures for predeprivation relief in chapter 72 of the Florida Statutes, the sales tax paid by Newsweek could properly have been contested in a predeprivation proceeding pursuant to section 72.011. We agree that *McKesson* is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful predeprivation remedy. The Court's holding was that states are obligated to provide a

meaningful opportunity to secure postpayment relief when the state penalizes the taxpayer for failing to pay first and obtain review of the tax's validity later in a refund action. The penalties which the Supreme Court found coerced taxpayers into paying the tax before contesting the validity of the taxing scheme in *McKesson* included the possibility that the county sheriff could be directed "to levy upon and sell the delinquent taxpayer's goods and chattels to recover the amount of the unpaid tax plus a penalty of 50%, along with interest of 1% per month" as well as the possibility that the Division might revoke or decline to renew the distributor's license. *McKesson*, 496 U.S. at 38 n. 20.

In the present case, the taxpayer could have availed itself of a predeprivation remedy under section 72.011, Florida Statutes (1987). Newsweek had the option of filing suit in circuit court to contest the legality of this tax and paying the amount of the contested tax into the registry of the court. *See* § 72.011(1), (3)(b). One who contests a tax and utilizes the procedure of paying the contested amount into the registry of the court cannot be said to have evaded the payment of the tax for purposes of liability for the penalty provided in section 212.12(2)(a), nor can the ultimate payment of such funds be considered "in jeopardy" for purposes of the provision in section 212.15(4) (under which a warrant may be issued for collection by the sheriff through levying upon the property of the taxpayer). The taxpayer retains the ownership of the funds paid into the registry of the court, as well as any interest earned on those monies. *See Greco v. Tampa Wholesale Co.*, 522 So. 2d 506 (Fla. 2d DCA) (explaining that under *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) the funds deposited in the registry of the court did not become public funds, and that earnings thereon were an incident of the ownership of the funds), *review denied mem.*, 531 So. 2d 168 (Fla. 1988), *cert. denied mem.*, 488 U.S. 1006 (1989). More-

over, while section 28.33, Florida Statutes (1995) states, in pertinent part, that "[m]oneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, . . ." the taxpayer also has the right to file a cash bond or surety in the amount of the contested tax assessment, or to seek a court order approving an alternative arrangement. § 2.011(3)(b)2.; *see also Don's Sod Co., Inc. v. Florida Dep't of Revenue*, 661 So. 2d 896 (Fla. 5th DCA 1995). *See generally Florida Dep't of Revenue v. Nu-Life Health and Fitness Center*, 623 So. 2d 747 (Fla. 1st DCA 1992) (section 72.011 not an unconstitutional deprivation of access to courts, because the taxpayer has the alternative of seeking a waiver from the Department of the obligation to pay the contested tax into the registry of the court or to file a motion for court approval of an alternative security arrangement; also finding that there was no denial of access to courts because the taxpayer has the alternative of filing an administrative petition under chapter 120 without having to tender the amount of the contested tax). A taxpayer cannot reasonably be considered liable for penalties for availing himself of the procedure provided in chapter 72. *See State ex rel. East Coast Lumber & Supply Co. v. Lee*, 172 So. 722, 728 (Fla. 1937) (Davis, J., concurring). Thus, the coercive penalties which deprived the taxpayers in *McKesson* of any effective predeprivation remedy are not factors in this case. The taxpayers in *McKesson* were subject to onerous penalties if they did not pay the disputed tax before seeking a refund in a proceeding contesting the constitutionality of the tax. They had no predeprivation remedy because section 72.011 was not available to contest the liquor taxes at issue in that case; for that reason, *McKesson* is inapplicable.

Accordingly, we AFFIRM the order denying Newsweek's motion for summary judgment and granting final summary judgment to the defendants.

DAVIS, J., CONCURS WITH WRITTEN OPINION; BENTON, J., CONCURS IN RESULT WITH WRITTEN OPINION.

DAVIS, J., Concurring.

I agree with the decision holding that Newsweek's Due Process rights were not violated by the state's refusal to provide a refund or other retroactive relief to Newsweek. In addition, I believe there is a valid alternative basis for finding *McKesson* distinguishable and affirming the trial court. In *McKesson*, the taxpayers filed suit challenging the constitutionality of the taxing scheme and seeking a refund of the taxes paid pursuant to that scheme. The Supreme Court was required to consider the proper remedy for the constitutional violation established in that very case. In contrast, Newsweek asserts that it was not a party to the *Magazine Publishers* case in which the unconstitutionality of this taxing scheme was determined. Thus, the issue presented in the instant case is not the one found in *McKesson* (i.e.: the correct remedy to be afforded to the party who has established the unconstitutionality of the tax scheme), but rather whether the *Magazine Publishers* decision invalidating the tax scheme should be applied retroactively to justify a refund action by one who was not a party to the first case.

In *American Trucking Ass'n., Inc. v. Smith*, 496 U.S. 167 (1990), the Court held that taxpayers were not entitled to have an intervening case in which the unconstitutionality of a tax was decided applied retroactively to authorize refunds of the tax they had paid while the statute was believed to be valid. *American Trucking* explains that equitable considerations are relevant to the determination whether a decision should be applied retroactively. 496 U.S. at 179. Just as this court reasoned in *Dryden v. Madison County*, 672 So. 2d 840, 843 (Fla. 1st DCA), *review granted mem.*, 678 So. 2d 338 (Fla. 1996), *McKesson* did not over-rule *Gulesian v. Dade*

County School Board, 281 So. 2d 325 (Fla. 1973) in which the court held that equitable considerations justified the denial of refunds of an unconstitutional tax. *See also Martinez v. Scanlan*, 582 So. 2d 1167, 1174, 1175 n. 7 (Fla. 1991) (citing both *Gulesian* and *McKesson*). The taxing scheme contested successfully in *Magazine Publishers* was facially content-neutral. It was invalidated because a rule promulgated by the Department of Revenue established that the statutory scheme was being applied discriminatorily based upon content in violation of the First Amendment. *Magazine Publishers*, 604 So. 2d at 461-62. Equitable considerations do not justify the retroactive application of the *Magazine Publishers* decision in refund actions brought by taxpayers who were not parties to the *Magazine Publishers* suit, based upon the fact that this statute was facially content-neutral as well as the *Leathers v. Medlock*, 499 U.S. 439 (1991) decision holding that distinctions in taxation between different types of media are not necessarily violative of the First Amendment.

BENTON, J., concurring in result.

I concur on the narrow ground that sections 72.011(1) and 120.575, Florida Statutes (1987), taken together, "provided a fair and meaningful predeprivation procedure," *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 38 n.21, 110 S. Ct. 2238, 2251, 110 L. Ed. 2d 17 (1990), which the taxpayer bypassed at its peril.

APPENDIX C

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No. 95-1971

NEWSWEEK, INC.,

Plaintiff,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a state agency,

-and-

LAWRENCE H. FUCHS, as Executive Director of the Department of Revenue of the State of Florida,

-and-

ROBERT F. MILLIGAN, as Comptroller of the State of Florida,

Defendants.

FINAL SUMMARY JUDGMENT

On November 29, 1995, the above styled case was heard before this Court on Plaintiff's Motion for Summary Judgment as to Count I of the Complaint and Defendants' Motion for Summary Judgment. This Court finds that there are no issues of material fact involved and that summary judgment is appropriate for this case. Having reviewed the documents, pleadings and memoranda of law filed in this case by the parties and having heard the arguments of Counsel in this case, it is

ORDERED AND ADJUDGED

1. Plaintiff's Motion for Summary Judgment as to Count I of the Complaint is hereby denied.

2. Defendants' Motion for Summary Judgment, for the reasons, arguments and the authorities contained therein, is hereby granted.

3. Each side shall bear its own costs and attorneys fees.

4. Plaintiff shall take nothing from this action.

5. Defendants shall goes hence without day.

DONE AND ORDERED this 12th day of April, 1996.

/s/ William Gary
WILLIAM GARY
Circuit Court Judge

APPENDIX D

DISTRICT COURT OF APPEAL
FIRST DISTRICT
Tallahassee, Florida 32399
Telephone No. (904) 488-6151

March 27, 1997

Case No: 96-01882
L.T. Case No. 95-1971

NEWSWEEK, INC.,
Appellant(s),

v.

DEPARTMENT OF REVENUE OF
THE STATE OF FLORIDA,
Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing and for rehearing en banc, and motion for certification, filed March 5, 1997, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, Clerk

By: /s/ Anne Moore
Deputy Clerk

APPENDIX E

RELEVANT STATUTORY PROVISIONS

Fla. Stat. § 72.011 (1987)

72.011 Jurisdiction of circuit courts in specific tax matters; administrative hearings and appeals; time for commencing action; parties; deposits.

(1) A taxpayer may contest the legality of any assessment of tax, interest, or penalty provided for under s. 125.0104, chapter 198, chapter 199, chapter 201, chapter 203, chapter 206, chapter 207, chapter 211, chapter 212, chapter 213, chapter 214, chapter 220, chapter 221, s. 336.021, s. 336.025, chapter 376, or chapter 624 by filing an action in circuit court; or, alternatively, the taxpayer may file a petition under the applicable provisions of chapter 120. However, once an action has been initiated under s. 120.56, s. 120.565, or s. 120.57, no action relating to the same subject matter may be filed by the taxpayer in circuit court, and judicial review shall be exclusively limited to appellate review pursuant to s. 120.68; and once an action has been initiated in circuit court, no action may be brought under chapter 120.

(2) No action may be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) after 60 days from the date the assessment becomes final. The Department of Revenue shall establish by rule when an assessment becomes final for purposes of this section and a procedure by which a taxpayer shall be notified of the assessment. It is not necessary for the department to file or docket any assessment with the agency clerk in order for such assessment to become final for purposes of an action initiated pursuant to this chapter or chapter 120.

(3) In any action filed in circuit court contesting the legality of any tax, interest, or penalty assessed under a

section or chapter specified in subsection (1), the plaintiff must:

(a) Pay to the department the amount of the tax, penalty, and accrued interest assessed by the department which is not being contested by the taxpayer; and either

(b) 1. Tender into the registry of the court with the complaint the amount of the contested assessment complained of, including penalties and accrued interest, unless this requirement is waived in writing by the executive director of the department; or

2. File with the complaint a cash bond or a surety bond for the amount of the contested assessment endorsed by a surety company authorized to do business in this state, or by any other security arrangement as may be approved by the court, and conditioned upon payment in full of the judgment, including the taxes, costs, penalties, and interest, unless this requirement is waived in writing by the executive director of the department.

Failure to pay the uncontested amount as required in paragraph (a) shall result in the dismissal of the action and imposition of an additional penalty in the amount of 25 percent of the tax assessed.

(4) (a) Except as provided in paragraph (b) of this subsection, an action initiated in circuit court pursuant to subsection (1) shall be filed in the Second Judicial Circuit Court in and for Leon County or in the circuit court in the county where the taxpayer resides or maintains its principal commercial domicile in this state.

(b) Venue in an action initiated in circuit court pursuant to subsection (1) by a taxpayer that is not a resident of this state or that does not maintain a commercial domicile in this state shall be in Leon County. Venue in an action contesting the legality of an assessment arising

under chapter 198 shall be in the circuit court having jurisdiction over the administration of the estate.

(5) The requirements of this section are jurisdictional.

(6) This section is not applicable to actions for refund of taxes previously paid.

(7) Any action brought under this chapter is not subject to the provisions of chapter 45 as amended by chapter 87-249, Laws of Florida, relating to offers of settlement.

Fla. Stat. § 215.26 (1987)

215.26 Repayment of funds paid into State Treasury through error.

(1) The Comptroller of the state may refund to the person who paid same, or his heirs, personal representative, or assigns, any moneys paid into the State Treasury which constitute:

(a) An overpayment of any tax, license, or account due;

(b) A payment where no tax, license, or account is due; and

(c) Any payment made into the State Treasury in error;

and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective funds from time to time such sums as may be necessary for such refunds.

(2) Application for refunds as provided by this section shall be filed with the Comptroller, except as otherwise provided herein, within 3 years after the right to such refund shall have accrued else such right shall be barred. The Comptroller may delegate the authority to accept an application for refund to any state agency vested by law with the responsibility for the collection of any tax,

license, or account due. Such application for refund shall be on a form approved by the Comptroller and shall be supplemented with such additional proof as the Comptroller deems necessary to establish such claim; provided, such claim is not otherwise barred under the laws of this state. Upon receipt of an application for refund, the state agency to which the funds were paid shall make a determination of the amount due. If an application for refund is denied, in whole or in part, such state agency shall so notify the applicant stating the reasons therefor. Upon approval of an application for refund, such state agency shall furnish the Comptroller with a properly executed voucher authorizing payment.

(3) No refund of moneys referred to in this section shall be made of an amount which is less than $1, except upon application.

(4) This section is the exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury.

(5) When a taxpayer has pursued administrative remedies before the Department of Revenue pursuant to s. 213.21 and has failed to comply with the time limitations and conditions provided in s. 72.011 and s. 120.575, a claim of refund under subsection (1) shall be denied by the Comptroller. However, the Comptroller may entertain a claim for refund under this subsection when the taxpayer demonstrates that his failure to pursue remedies under chapter 72 was not due to neglect or for the purpose of delaying payment of lawfully imposed taxes and can demonstrate reasonable cause for such failure.

120.575 Taxpayer contest proceedings.—

(1)(a) In any administrative proceeding brought pursuant to chapter 120 as authorized in s. 72.011(1), the taxpayer or other substantially affected party shall be designated the "petitioner" and the Department of Revenue shall be designated the "respondent."

(b) In any such administrative proceeding brought pursuant to s. 120.57(1) as authorized in s. 72.011(1) to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon or penalty therefor, the following procedures shall apply, any provisions of the chapter to the contrary notwithstanding:

1. The petition shall be filed with the division, which shall forward a copy to the department immediately upon receipt of the petition.

2. The hearing officer or panel provided in s. 120.65(5) shall conduct all proceedings under this paragraph.

3. Within 10 days after receiving the petition, the hearing officer or panel shall accept or deny the petition.

4. Within 30 days after the hearing or receipt of the hearing transcript, whichever is later, the hearing officer or panel shall issue an order, which shall consist of findings of fact, conclusions of law, interpretation of administrative rules, and any other information required by law or rule to be contained in the final order. Such order shall affirm or deny the assessment, interest, or penalty and shall determine the amount of any assessment, interest, or penalty.

5. The order of the hearing officer or panel shall be final agency action.

(2) In any administrative proceeding brought pursuant to s. 120.57, the department's burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the department made the assessment.

(3)(a) Before a taxpayer may file a petition under this chapter, he shall pay to the department the amount of taxes, penalties, and accrued interest assessed by the de-

partment which are not being contested by the taxpayer. Failure to pay the uncontested amount shall result in the dismissal of the action and imposition of an additional penalty of 25 percent of the amount taxed.

(b) The requirements of s. 72.011(2) and (3)(a) are jurisdictional for any action under this chapter to contest an assessment by the Department of Revenue.

(4)

Supreme Court, U.S.
FILED
NOV 26 1997
CLERK

No. 97-663

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NEWSWEEK, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS, and ROBERT F. MILLIGAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Florida's doctrine of *res judicata* was properly applied to Newsweek's refund claim in this case.

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No. 97-663

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NEWSWEEK, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS, and ROBERT F. MILLIGAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves the application of the doctrine of res judicata to Newsweek's refund claim. The Florida Supreme Court's decision in Department of Revenue v. Magazine Publishers of America, 604 So. 2d 459 (Fla. 1992) is both stare decisis and *res judicata* to Newsweek. These issues were the only grounds for the State's Motion for

Summary Judgment and the trial court granted summary judgment only on those grounds. The District Court of Appeal, while addressing an issue raised only by Newsweek, affirmed the trial court's final judgment.

A. MAGAZINE PUBLISHERS OF AMERICA, INC.

On July 6, 1988, Magazine Publishers of America ("MPA") filed an action against the Florida Department of Revenue in the Second Judicial Circuit Court. MPA challenged the constitutionality of the sales tax imposed on magazines, Case No. 88-2442. It asserted that an invalid discrimination between magazines and newspapers existed. The sale of a magazine was taxable under Sec. 212.05, Fla. Stat. (1987). However, the sale of a newspaper was exempt under Sec. 212.08(7)(w), Fla. Stat. (Supp. 1988). MPA sought a declaratory judgment that it was unlawful to tax magazines while exempting newspapers.

In their lawsuit, MPA described itself as "a national trade association comprising 213 magazine publishers who publish 801 magazines sold at newsstands and by subscription." MPA admitted it was a "New York non-profit corporation." Id. MPA described the activities of its members stating that "MPA members, . . ., *are* subject to the

magazine sales tax pursuant to Sec. 212.05(1)(i), Fla. Stat.

Prior to the lawsuit, Sec. 212.05(1)(i), Fla. Stat. (1987), had been adopted and it imposed a tax on the sale and purchase of magazines. The law had taken effect on January 1, 1988. At the time MPA filed the suit on behalf of its members, the tax on the sale of magazines had been in effect for six (6) months. During this time, Sec. 212.08(7)(w), Fla. Stat. (Supp. 1988), *exempted* the sale or purchase of a newspaper from the imposition of the sales tax under Sec. 212.05, Fla. Stat. MPA alleged that the tax on the sales of its members' magazines under Sec. 212.05(1)(i), Fla. Stat., was unconstitutional on its face, and as applied, in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 2 and 4 of the Florida Constitution. MPA's complaint was grounded on the fact that the sale of a magazine was **taxed**, while the sale of a newspaper was **exempt**.

For relief, MPA sought two remedies from the trial court:

a. a declaration that Sec. 212.05(1)(i), Fla. Stat. (1987), was unconstitutionally "void on its face"; and
b. an injunction restraining the Florida Department of Revenue from collecting the

sales tax imposed on the sale of magazines by Sec. 212.05(1)(i), Fla. Stat. (1987).

The MPA requested the trial court to void the tax on the sale of magazines, Sec. 212.05(1)(i), Fla. Stat., and to enjoin the Department from further collecting sales tax on the sale of magazines. MPA sought an extension of the exemption enjoyed by the newspapers; MPA did not seek invalidation of the newspaper exemption under Sec. 212.07(8)(w), Fla. Stat. *MPA did not request or seek a refund of the tax remitted on the sale of magazines in Florida pursuant to Sec. 212.05(1)(i), Fla. Stat.*

The MPA moved for Summary Judgment. In its supporting memorandum MPA again asserted that "[m]embers of Plaintiff Magazine Publishers of America. . . , publish [magazines] that are sold in Florida and that Defendant Department of Revenue (DOR) contends are subject to the sales tax." MPA repeated that it was "a national trade association comprised of 213 publishers. . . ." In further support of MPA's status as representative of all the members of MPA, MPA filed the affidavit of its then President, a copy of MPA's By-laws and a copy of MPA's Mission Statement. MPA specifically recognized the instant

Petitioner, Newsweek, Inc., as a member of the association and sought to protect its rights.

On November 8, 1989, the trial court rendered an order granting the MPA's Motion for Summary Judgment. The Florida trial court found that the exemption for newspapers, Sec. 212.08(7)(w), Fla. Stat., unlawfully discriminated against the MPA. To eliminate the discrimination, the trial court struck Sec. 212.05(1)(i), Fla. Stat. The trial court *extended* the exemption contained in Sec. 212.08(7)(w), Fla. Stat., to include the sale of magazines.

Upon first review, the Florida Supreme Court found that the sales tax unlawfully discriminated against magazines by treating some periodicals differently than other periodicals. Department of Revenue v. Magazine Publishers of America, 565 So. 2d 1304, 1307 (Fla. 1990) (hereinafter Magazine Publishers I). The Court then found, applying the "strict scrutiny" test, that the discrimination was not legal. Id., at 1308. The Supreme Court of Florida affirmed this part of the decision below. Id., at 1309.

However, upon review of the remedy created below, the Supreme Court of Florida expressly rejected the finding

that the "tax on magazines . . . must be stricken to remedy the constitutional defect." Id. , at 1309 (Further stating "[i]t does not follow from this that it is the tax on magazines that is unconstitutional.") The Court stated that "magazines are not singled out for taxation." Id.

The Court looked to Florida law to determine the proper remedy for the situation. Id., at 1310. The Supreme Court of Florida found that the Legislature had already determined that the courts of the State were to look to Sec. 212.21, Fla. Stat., in crafting a remedy. The Court ruled that this statute stood for the proposition that the courts were to favor preserving the tax over expanding an exemption. Id. The Supreme Court determined that the proper remedy available to the MPA was to strike the exemption granted to the newspapers under Sec. 212.08(7)(w), Fla. Stat. Id., at 1309. The Court's decision rendered the sale of newspapers subject to the Florida Sales Tax and retained the tax on the sale of magazines.

Intervenor Miami Herald sought review by this Court of the Florida Supreme Court's decision. This Court granted Miami Herald's petition for a writ of certiorari, vacated the Florida Supreme Court's first decision, Magazine Publishers

I, and remanded the case back to the Supreme Court of Florida so that the Florida Supreme Court could reconsider its decision in light of this Court's then recently announced opinion in Leathers v. Medlock, 499 U.S. 439 (1991). Miami Herald Publishing Co. v. Department of Revenue, 499 U.S. 472 (1991).

Upon remand, the Supreme Court of Florida reexamined its earlier decision in light of Leathers. After restating its earlier findings and holdings, the Court found that the Florida sales tax itself did not violate the First Amendment because it did not single out the press for special treatment. Department of Revenue v. Magazine Publishers of America, 604 So. 2d 459, 461 (Fla. 1992) (hereinafter Magazine Publishers II). The Florida Supreme Court again found, however, that the exemption granted to the newspapers by Sec. 212.08(7)(w), Fla. Stat., caused an unlawful discrimination. It pointed out that the way that exemption was being administered was based upon the content of the publication. Magazine Publishers II, 604 So. 2d at 461-462. Once again the Florida Supreme Court affirmed the finding of an invalid discrimination under the State taxing scheme between newspapers and magazines.

Id. at 463.

Having again found the tax scheme flawed, the Florida Supreme Court held that the Leathers decision did not require any alteration in the Supreme Court of Florida's earlier decision as to the appropriate remedy in the case. Magazine Publishers II, 604 So. 2d, at 463. The Supreme Court of Florida held that "Sec. 212.21 makes it clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail." Id. The Supreme Court again reversed that part of the trial court's Final Summary Judgment striking the tax. It ordered that the exemption for newspapers be stricken instead. Magazine Publishers II, at 464.[1]/

B. NEWSWEEK

During the periods in question, Newsweek sold magazines in Florida. During the periods in question, Florida imposed a sales tax upon the sale of magazines. Sec. 212.05, Fla. Stat. The sales tax is imposed upon the ultimate consumer of the product. Sec. 212.07(1)(a), Fla. Stat.

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[1]/ The Supreme Court's ruling also struck the injunction against the Department which had restrained the Department from collecting the tax upon the sale of magazines.

Pursuant to Sec. 212.07(2), Fla. Stat., Newsweek, when acting as a dealer in tangible personal property, is required to add the tax to the retail price of magazines and to collect the sales tax from the retail purchaser. Furthermore, pursuant to Sec. 212.07(4), Fla. Stat., it is unlawful for a dealer such as Newsweek, to absorb the sales tax or otherwise relieve the consumer of the payment of all or part of the sales tax. Thus, Newsweek, as a dealer, had the statutory obligation to charge and collect, as well as remit, the sales tax imposed by Sec. 212.05, Fla. Stat., on the sale of its magazines in Florida.

Newsweek voluntarily chose not to follow clear and unambiguous Florida tax law. Instead, Newsweek made the business decision to ignore Florida law and absorb the Florida sales tax. In direct violation of Florida law, Newsweek refused to add the amount of the tax to the sales price, as required by Sec. 212.07(2), Fla. Stat. See Gaulden v. Kirk, 47 So. 2d 567 (Fla. 1950). Newsweek sought to create an injury to be taken before a court.

Following Magazine Publishers I, Newsweek filed a refund application with the State on January 1, 1991. The refund application, filed pursuant to Sec. 215.26, Fla. Stat., sought a refund of the sales tax Newsweek paid to the State

on account of magazine subscription sales for the period of January 1, 1988 through November 30, 1990.

The State denied Newsweek's refund application on December 28, 1994. Attached to the refund denial, was a typewritten explanation of the reason for the denial of Newsweek's claim. Appendix 1. The document explained that the denial was based on the Supreme Court of Florida's decision in Magazine Publishers II, and the fact that decision changed a long line of Florida Supreme Court decisions upholding the newspaper exemption. Therefore, the effect of the ruling was, as the Supreme Court of Florida had determined, prospective only. The refund denial and attached explanation, made no mention of any failure on the part of Newsweek to take advantage of any statute affording a predeprivation remedy. The denial explained Newsweek's rights as they existed under Sec. 72.011, Fla. Stat., to judicially challenge the denial of the refund.

Newsweek brought this action in the Florida circuit court on May 26, 1995. The State answered the complaint on October 16, 1995. The answer does not assert that Newsweek should be denied a refund because Newsweek failed to take advantage of any statute affording a

predeprivation remedy.

During discovery Newsweek admitted that during the years 1988 through 1992, Newsweek was a member of the MPA. It paid money, in the form of dues or maintenance, to MPA as part of Newsweek's membership requirements and responsibilities. Various officers of Newsweek served on the Board of Directors of MPA. It paid money, in the form of dues or maintenance, in excess of $200,000.00, including a special assessment for reimbursement of a portion of MPA's costs in litigating Magazine Publishers. It admitted that it has always been aware of MPA's Mission Statement and the particular mission "[t]o advocate and litigate on behalf of the industry." As a member of MPA, it has always been aware of MPA's by-laws and that it has not withdrawn its membership in MPA. As a member of MPA, it was aware of MPA's litigation efforts and the results in Magazine Publishers of America, Inc. v. The Department of Revenue, 2nd Judicial Circuit, Case No. 88-2442 and Department of Revenue v. Magazine Publishers of America, 604 So. 2d 459 (Fla. 1992). It admitted that it did not intervene in the case of Magazine Publishers of America, Inc. v. The Department of Revenue, 2nd Judicial Circuit, Case No. 88-2442, at any

time during the pendency of that case. Nor did it remove itself from among those benefitting from MPA's representation of its members in the case of Magazine Publishers of America, Inc. v. The Department of Revenue, 2nd Judicial Circuit, Case No. 88-2442, at any time during the pendency of that case. Finally, it admitted that it paid sales tax out of Newsweek's own funds and did not collect the sales tax from its magazine subscribers in Florida.

At the close of discovery both parties moved for summary judgment on November 9, 1995. The State based its argument on the fact that Newsweek was barred by res judicata in light of the Magazine Publishers II decision and on the argument that the Supreme Court of Florida announced that its remedy was prospective only. Appendix 2. At no time in the State's motion for summary judgment did the State assert that Newsweek should be denied a refund because Newsweek failed to take advantage of a statute granting a predeprivation remedy.

Newsweek itself first interjected the question of the supposed lack of a proper predeprivational remedy under

Florida law in its motion for summary judgment.[2]/

The trial court issued its ruling on April 12, 1996. The court granted the State's motion for summary judgment and denied Newsweek's. Appendix 3. The trial court granted the State's motion "for the reasons, arguments and the authorities contained therein. . . ." In so doing, the court affirmed the State's argument that Newsweek was barred by res judicata and that the Magazine Publishers II decision answered the matter fully.

Since the State did not assert in its motion for summary judgment that Newsweek should be denied a refund because Newsweek failed to take advantage of one of Florida's predeprivational remedy statutes, the trial court did not rule that Newsweek had failed to take advantage of one of Florida's predeprivational statutes. The issue of the availability of a predeprivational remedy was not a basis for the trial court's order.

Newsweek appealed the trial court's decision to Florida's First District Court of Appeal. Again, it was

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[2]/ Only in response did the State even discuss predeprivational remedies in Florida.

Newsweek that inserted the discussion of a predeprivational remedy into the discussion by making the argument in its initial brief. The State answered by arguing that the case should be affirmed based upon res judicata and due to the State's good faith reliance upon prior decisions of the Supreme Court of Florida construing the exemption for newspapers. The State restricted its response to Newsweek's predeprivation argument to one paragraph of its answer brief.

REASONS FOR DENYING THE WRIT

The writ should be denied because denial of Newsweek's refund is clearly consistent with the decisions of this Court. This case simply involves the application of the doctrine of res judicata to Newsweek's refund claim. There is no need to address the issue raised by Newsweek. The Petitioner properly filed an application for a refund, was denied by the State and the denial was affirmed by the trial court. The denial was affirmed by the Florida district court of appeal on grounds having nothing to do with the issue here raised by Newsweek.

Newsweek brought a refund application pursuant to Sec. 215.26, Fla. Stat. The State acted on that application and followed the refund procedures described under Sec. 215.26, Fla. Stat., while addressing Newsweek's application. The application was denied in accordance with Sec. 215.26, Fla. Stat.

Unfortunately, the State must address the implication made by Newsweek and the *amici* that the "State" played some sort of "bait and switch" tactic on Newsweek and the outcome in this case should be determined by this Court's decision in Reich v. Collins, 513 U.S. 106 (1994). Simply

put, issues involving the existence of a predeprivational remedy were not raised by the State in the administrative or judicial forum. The State did not assert that Newsweek should be denied a refund because Newsweek failed to take advantage of a statute affording predeprivation relief. The State narrowly asserted that Newsweek was barred from a refund by *res judicata* and the decision in Magazine Publisher II. As such, this case is not controlled by the decision in Reich v. Collins. Newsweek invited the result below. The State will not engage in speculation as to why Newsweek continues to raise these self-described "key" constitutional questions.

An additional supporting denial of a writ is worth mentioning. Newsweek attempts to convince this Court that the State of Florida is not following the Court's holding in McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), and that it did not follow this Court's judgment in McKesson itself. See, n.8, p.13. Newsweek alleges that:

> This Court's reversal . . . was never implemented. The liquor tax was never imposed retrospectively on those unconstitutionally exempted, and those who paid the tax were never issued refunds.

In fact, quite the contrary occurred. The State of Florida, following this Court's opinion, did assess those who had received the benefit of the preferred tax rate. The State announced the enactment of three Emergency Rules, Rule No. 7AER91-8, Rule No. 7AER91-9, and Rule No. 7AER91-10. On April 2, 1991, the Department mailed out a tax assessment and a copy of the emergency rules, via certified mail, return receipt requested, to each of the 52 distributors that had dealt in the preferred products between July 1, 1985 through June 30, 1988. Appendix 4, Affidavit of Robert Kronmiller, dated May 20, 1992, filed in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, No. 86-2997, 2nd Judicial Circuit. The amount assessed came to $8,199,966.[3]/ At the same time, the

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[3]/ As a result of the Department's April 2, 1991, "mail out":

A. Nine distributors paid their special assessments;
B. Thirty-two distributors challenged their assessment in Circuit Court;
C. One distributor was in bankruptcy;
D. One assessment was returned to Department as undeliverable; and
E. Nine distributors, received notice, but did not challenge nor pay their special assessment.

See Appendix 4 at pages 21-22.

same 52 distributors filed refund applications exceeding $300,000,000.

After proceeding to the trial court and while the matter was on appeal, all the parties, including McKesson, settled all outstanding claims between the State and the distributors, with the exception of Tampa Crown Distributor. As to Tampa Crown, contrary to the implication of n.8, the district court of appeal decided that Tampa Crown, because of res judicata with respect to the original decision of the Supreme Court of Florida in Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 524 So. 2d 1000, 1010 (Fla. 1988), had no standing to seek a refund. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 643 So. 2d 16 (Fla. 1st DCA 1994), aff'd sub nom. Tampa Crown Distributors, Inc., v. Division of Alcoholic Beverages and Tobacco, et al., __ U.S. __, 115 S.Ct. 1795 (1995). Appendix 5.

Further, not only did the State follow this Court's holding in McKesson, it followed the holding explicitly in the case of Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). Kuhnlein concerned a challenge to Sec. 319.213, Fla. Stat., and the $295.00 impact fee imposed upon

motor vehicles first titled in another state. The Florida Supreme Court struck the statute finding the law violated the Commerce Clause to the United States Constitution. The Supreme Court of Florida then reviewed what the proper remedy must be under McKesson. Since the statute was found to be *void ab initio*, and there was no way the State could correct the discrimination, the Supreme Court ordered a full refund of all the fees collected. Kuhnlein, 646 So. 2d, at 726-727. The State set up a procedure to locate and confirm all those who paid the fee. The State has refunded most of the $189 million collected.

Therefore, contrary to the implications of Newsweek and the amici, Florida is not disregarding this Court's holdings. The State is following all of the decisions of this Court including, but not limited to, McKesson.

I. FLORIDA LAW DID NOT CONTEMPLATE NEWSWEEK PAYING THIS TAX; NEWSWEEK PLACED ITSELF IN ITS CURRENT POSITION BY VIOLATING FLORIDA TAX LAW

Newsweek sold magazines in Florida during a time

when they were subject to tax. Section 212.05, Fla. Stat.[4]/ Newsweek, as the seller of tangible personal property, is a "dealer."[5]/ Sales tax is intended to be separately stated and collected from the retail consumer of the product. Section

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[4]/ Section 212.05, Fla. Stat., entitled "Sales, storage, use tax," states in pertinent part:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1. a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

[5]/ Section 212.06(2)(c), defines "dealer" "every person, as used in this chapter, who sells at retail or who offers for sale at retail, or who has in his or her possession for sale at retail; or for use, consumption, or distribution; or for storage to be used or consumed in this state, tangible personal property as defined herein, including a retailer who transacts a mail order sale."

212.07(1)(a), Fla. Stat.[6]/; Section 212.07(2), Fla. Stat.[7]/ Only if a purchaser does not pay the sales tax or the dealer refuses to collect the tax, does a dealer become liable for the payment of the Florida sales tax.[8]/ In fact, it is a crime to refuse to impose and collect the sales tax from purchasers.[9]/

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[6]/ Section 212.07(1)(a), Fla. Stat., states "[t]he privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer."

[7]/ Section 212.07(2), Fla. Stat., states, in pertinent part, "[a] dealer shall, as far as practicable, add the amount of the tax imposed under this chapter to the sale price, and the amount of the tax shall be separately stated as Florida tax on any charge ticket, sales slip, invoice, or other tangible evidence of sale. Such tax shall constitute a part of such price, charge, or proof of sale which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts."

[8]/ Section 212.07(2), Fla. Stat., states, in pertinent part, "[e]xcept as otherwise specifically provided, any dealer who neglects, fails, or refuses to collect the tax herein provided upon any, every, and all retail sales made by the dealer or the dealer's agents or employees of tangible personal property or services which are subject to the tax imposed by this chapter shall be liable for and pay the tax himself or herself."

[9]/ Section 212.07(3), Fla. Stat., states "[a]ny dealer who fails, neglects, or refuses to collect the tax herein provided, either by himself or herself or through the dealer's agents or employees, is, in addition to the penalty of being liable for and paying the tax himself or herself, guilty of a misdemeanor of the first degree, punishable as provided in s.

In order to protect the integrity of the sales tax system and to prevent an appearance of economic advantage among some sellers of tangible personal property, Sec. 212.07(4), Fla. Stat., prohibits a dealer, such a Newsweek, from absorbing the sales tax or relieving the consumer of the payment of all or part of the sales tax. Section 212.07(4), Fla. Stat.[10]/ Thus, Newsweek, as a dealer, had the statutory obligation to charge and collect the tax imposed by Sec. 212.05, Fla. Stat., on the sale and purchase of its magazines from those purchasing its magazines, pursuant to Sec. 212.07(1)(a), Fla. Stat.

Newsweek did not add the amount of the tax to the

775.082 or s. 775.083."

[10]/ Section 212.07(4), Fla. Stat., states "[a] dealer engaged in any business taxable under this chapter may not advertise or hold out to the public, in any manner, directly or indirectly, that he or she will absorb all or any part of the tax, or that he or she will relieve the purchaser of the payment of all or any part of the tax, or that the tax will not be added to the selling price of the property or services sold or released or, when added, that it or any part thereof will be refunded either directly or indirectly by any method whatsoever. A person who violates this provision with respect to advertising or refund is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A second or subsequent offense constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."

sales price, as required by Sec. 212.07(2), Fla. Stat. It chose to violate Sec. 212.07(4), Fla. Stat., by refusing to separately charge the sales tax[11]/. See Gaulden v. Kirk, 47 So. 2d 567 (Fla. 1950). Newsweek made the deliberate choice to violate clear and unambiguous Florida tax law. Newsweek voluntarily created the injury of which it now complains.

II. THE FLORIDA COURTS CORRECTLY HELD THAT NEWSWEEK'S CLAIM FOR REFUND IS BARRED BY *RES JUDICATA*

This case involves the application of the doctrine of res judicata to Newsweek's refund claim. The Florida Supreme Court's decision in Magazine Publishers II, is both stare decisis and *res judicata* to Newsweek. These issues were the only grounds for the State's motion for summary judgment and the trial court granted summary judgment only on those grounds. The District Court of Appeal, while addressing an issue raised only by Newsweek, affirmed the trial court's final judgment. Newsweek, Inc., v. Department of Revenue, 689 So. 2d 361 (Fla. 1st DCA 1997), Appendix 6.

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[11]/ Thus, *amici*'s assertion that Newsweek "legally collected the tax" is just not true. Newsweek "collected" no sales taxes whatsoever; it improperly paid the taxes from its own funds.

The trial court granted Final Summary Judgment in all areas urged by the State. It did so "for the reasons, arguments and the authorities contained therein, . . ." Appendix 3. The State moved for summary judgment based, primarily, on the doctrine of *res judicata*. Appendix 2. The Magazine Publishers II opinion held that the appropriate remedy to the discrimination occasioned by administration of the newspaper exemption in Florida was to strike the exemption. Magazine Publishers II. Since the Florida Supreme Court determined the proper remedy, under the doctrine of stare decisis, the trial court was bound by the Florida Supreme Court's decision in Magazine Publishers II.

The trial court determined that Newsweek's refund action is barred by the doctrine of *res judicata* because Newsweek was a member of MPA. When MPA brought an action on behalf of its members regarding the same issues raised in Magazine Publishers of America, Inc. v. Department of Revenue, 2nd Judicial Circuit Court, Case No. 88-2442, the MPA represented the legal interests of all its members. The facts and circumstances of this case are identical to those in Magazine Publishers II, the only difference being the form of relief requested by Newsweek.

MPA did not seek a refund of tax paid by its members. Since a refund for its members could have been sought by MPA, the trial court determined that Newsweek is now barred from requesting a refund in the instant action.

Newsweek did not withdraw itself from representation by MPA in that suit. The trial court determined that the necessary elements to show *res judicata* were present below. The summary judgment found that, as a matter of State law, the judgment in Magazine Publishers II conclusively established the remedy for the discrimination found by that Court to exist.

Under Florida law, the general principle behind the doctrine of "res judicata" is that a final judgment of a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated issue. Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984), (citing, Gordon v. Gordon, 59 So. 2d 40, 43 (Fla. 1952)).

Florida law recognizes that a class of persons, while not party to a particular suit, may be represented in that lawsuit by another. This form of representation is known as "virtual representation." Hinchee v. Fisher, 93 So. 2d 351, 353 (Fla. 1957) [overruled on other grounds]; Progressive American

Insurance Co. v. McKinnie, 513 So. 2d 748, 749 (Fla. 4th DCA 1987); Hardee v. Gordon Thompson Chevrolet, 154 So. 2d 174 (Fla. 1st DCA 1963); Gordon v. Gordon, 59 So. 2d 40, 43-44 (Fla. 1952); Nichols Engineering & Research v. State, 59 So. 2d 874 (Fla. 1952); Wolfson v. Rubin, 52 So. 2d 344, 346 (Fla. 1951). When the test of "virtual representation" is met, then the non-party can be bound by the doctrine of res judicata. Because of Newsweek's relationship with MPA and the prior litigation, the trial court determined that Newsweek was represented in Magazine Publishers II and could have raised all issues at that time. Newsweek chose its path and is now barred from bringing another lawsuit by *res judicata*.

CONCLUSION

The Department submits, for the foregoing arguments and authorities, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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**Counsel of Record*

Counsel for Respondents

APPENDICES

APPENDIX 1

ATTACHMENT TO DR-1200R
CLAIM REFERENCE #: 91046022
$283,707.57: AMOUNT CLAIMED
$283,707.57: AMOUNT DENIED
$0.00: AMOUNT DUE

REASON FOR DENIAL:

The Florida Supreme Court's opinion in Department of Revenue v. Magazine Publishers explicitly resolves the question raised by your request for refund because it holds that the proper remedy under Florida law is to strike the exemption granted to newspapers. The Court did not find that a tax on magazines was objectionable. The remedy provided by the Florida Supreme Court did not entitle any litigant to a refund and was purely prospective. The United States Supreme Court decided in the case of James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991), that application of a rule of law to litigants generally requires application of that rule to all others.

Reliance on McKesson Corporation v. Division of Alcoholic Beverages, 496 U.S. 18 (1990), in the current context is misplaced since that case considered a new enactment which attempted to circumvent the Court's clear precedent. McKesson described the circumstances under which a federal court would rest control over issues of remediation normally decided as a matter of state law - what the Court termed the constitutional threshold. See James B. Beam, supra. No such considerations came into play here. The newspaper exemption was longstanding and had been repeatedly scrutinized by Florida Courts. Thus the Florida Supreme Court has decided the appropriate remedy as a matter of state law in Magazine Publishers. That decision is

final and the remedy there announced does not authorize the Department to grant a refund under the circumstances described in your request. Under these circumstances, the Department lacks authority to grant you a refund under Section 215.26, Florida Statutes.

APPENDIX 2

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

NEWSWEEK, INC.,

Plaintiff,

v. CASE NO. 95-1971

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a state agency,

and-

LAWRENCE H. FUCHS, as
Executive Director of the
Department of Revenue of the
State of Florida,

-and-

ROBERT F. MILLIGAN, as
Comptroller of the State of Florida,
Defendants.
_____/

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, Department of Revenue of the State of Florida, Lawrence H. Fuchs, as Executive Director of the

Department of Revenue of the State of Florida, and Robert F. Milligan, as Comptroller of the State of Florida, (collectively referred to as "the Department"), by and through undersigned attorneys, pursuant to Fla. R. Civ. P. 1.510, moves this Court for Summary Judgment in the above styled case, in that there is no dispute of any material facts and the Department is entitled to judgment as a matter of law, and for grounds would state:

Facts

1. Plaintiff, Newsweek, Inc., (hereinafter "Newsweek") filed a refund application with the Department on January 18, 1991, requesting a refund in the amount of $283,707.57, of sales taxes remitted on sales of magazine subscriptions for the period January 1, 1988 through November 30, 1990.[1] See, Complaint, p. 3, para. 8.

2. The Department, on December 28, 1994, denied Newsweek's refund request. See, Exhibit "B" attached to Newsweek's Complaint.

3. Thereafter, Newsweek brought this action against the Department seeking declaratory, monetary and injunctive relief and attorney fees pursuant to §§ 72.011, and 86.011

[1] Newsweek alleges that the sales taxes in question were paid by it and not collected from its subscribers. See, Complaint, p. 3, para. 8.

Fla. Stat., Art. I 2, 4 and 9, Fla. Const., the 14th Amendment to the U. S. Constitution and 42 U.S.C. §§ 1983 and 1988.

4. Newsweek now seeks a judicial determination of the validity of the Department's denial of Newsweek's refund request and seeks declaratory and injunctive relief alleging that the Department's denial of its refund request has deprived Newsweek of its "rights, privileges and immunities under the United States Constitution." Complaint, p. 3, para. 8.

5. The Department filed a Motion to Dismiss on the grounds that Newsweek failed to state a claim upon which relief may be granted, and that this Court lacked jurisdiction over the subject matter.

6. After a hearing, this Court, on September 30, 1995, issued an Order denying the Department's motion without prejudice.

7. The Department served its Answer and Affirmative Defenses and Defenses to Newsweek's Complaint on October 16, 1995, together with Interrogatories, a Request for Admissions and a Request for Production of Documents.

History of the Taxation of Magazines

8. Prior to 1988 all newspapers and magazines were subject to sales tax. Gasson v. Gay, 49 So. 2d 525 (Fla. 1950). See, also, §§ 212.08(6), and 212.08(7)(e), Fla. Stat. (1985).

9. In 1988 the Florida Legislature amended § 212.08, Fla. Stat., by removing the exemption for magazines, while retaining the exemption for newspapers. See, § 212.08(7)(w), Fla. Stat. (Supp. 1988).

10. Shortly thereafter, Magazine Publishers of America, Inc., (hereinafter "MPA"), brought an action on behalf of its members against the Department challenging the tax on magazine subscriptions and requesting that the Court judicially enact the same exemption enjoyed by the newspapers.

11. Newsweek, at the time of the Magazine Publishers suit, was a member of MPA. Furthermore, Newsweek is still a member of MPA.

12. In his Affidavit, Donald D. Kummerfeld, then President of MPA, states that a stated purpose of MPA is to "[S]ecure freedom from unjust and unlawful extractions . . . [f]urther in accordance with the Statement of Mission of the association, the association is authorized 'to advocate and litigate on behalf of the industry.'" Kummerfeld Affidavit, at para. 4.

13. This Court, on motions for summary judgment, entered Final Summary Judgment in favor of MPA finding that Ch. 212, Fla. Stat. (Supp. 1988), imposed "a differential tax on the press and singl[ed] out magazines for taxation while exempting newspapers." Magazine Publishers of America, Inc., et al., v. State, Department of Revenue, Case No. 88-2442, Final Summary Judgment at pp. 4-5, (Fla. 2nd Jud. Cir. November 8, 1989).

14. Having decided that Ch. 212, Fla. Stat. (Supp. 1988), treated magazines and newspapers differently, in that one was taxed and the other was exempt, this Court fashioned a remedy extending the exemption afforded to newspapers, to the magazines. See, § 212.08(7)(w), Fla. Stat. (Supp. 1988), Magazine Publishers of America, Inc., et al., v. State, Department of Revenue, Case No. 88-2442, Final Summary Judgment at p. 5, (Fla. 2nd Jud. Cir. November 8, 1989).

15. On appeal, the Florida Supreme Court affirmed the part of this Court's Final Summary Judgment that the statute in question differentiated amongst members of the media based upon the content of the publication. See, Department of Revenue v. Magazine Publishers of America, Inc., 565 So. 2d 1304, 1309 (Fla. 1990), vacated, Miami Herald Publishing Co. v. Department of Revenue, 499 U. S. 972 (1991), on remand, Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459, 462 (Fla. 1992).

16. The Florida Supreme Court, when considering the proper remedy in that case, reversed the portion of this Court's Final Summary Judgment where this Court had fashioned an improper remedy by extending the exemption afforded the newspapers to the magazines and found:

> Accordingly, we affirm that portion of the trial court's order which holds that chapter 212 impermissibly burdens First Amendment rights and does not serve a compelling state interest. However, having concluded that under state law the appropriate remedy is to strike the newspaper exemption granted by section 212.08(7)(w), Florida Statutes (Supp. 1988), we reverse that portion of the trial court's order which concludes that the appropriate remedy is

to strike the tax imposed on magazines. Magazine Publishers of America, Inc., 604 So. 2d at 463-464.

Res Judicata

17. Newsweek's' action is barred by the doctrine of res judicata because Newsweek was a member of the Magazine Publishers of America, Inc. MPA brought an action on behalf of its members against the Department over the same issues in the case of Magazine Publisher of America, Inc. v. Department of Revenue, 2nd Judicial Circuit Court, Case No. 88-2442.

18. In that case, MPA did not seek a refund of any taxes paid by its members. Newsweek did not withdraw MPA's representation of Newsweek in that suit. No refund was ordered in that case and the Supreme Court of Florida determined the proper remedy in that case was to strike the exemption, permitting the tax to prevail. Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992).

19. The general principle behind the doctrine of "res judicata" is that a final judgment of a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated issue. Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984), (citing, Gordon v. Gordon, 59 So. 2d 40, 43 (Fla. 1952)). However, res judicata applies only where all the principles of the doctrine are present. Id.

Thus, where the second suit is based upon the same cause of action and between the same parties, the first judgment bars the second. Gordon, 53 So. 2d at 44. For res judicata to apply, our Supreme Court requires that the following must occur simultaneously:

A. Identity of the thing sued for;
B. Identity of the cause of action;
C. Identity of the parties; and,
D. Identity of the quality in the person for or against whom the claim is made.

Albrecht, 444 So. 2d at 12.

20. In the present case, Newsweek's Complaint does not make any reference to the prior judicial action. MPA, as Newsweek's representative in the first action, and now Newsweek have both alleged the same primary wrong in both actions. Thus, it is clear what Newsweek seeks here is barred by the doctrine of res judicata. The earlier suit resulted in a final judgment; both Newsweek and the Department were involved in the earlier action. Most importantly, the same cause of action, based upon the same alleged infringement of rights and identical set of evidence, is presented in both suits. For this Court to grant the relief requested would impair the judgment rendered by the Supreme Court in the first action.

21. Newsweek has failed to state a claim upon which relief could be granted in that Newsweek claims that a refund of taxes is the only appropriate remedy. Newsweek fails to recognize that the Florida Supreme Court held that the appropriate remedy in that case was to strike the exemption, permitting the tax to prevail. Department of Revenue v.

Magazine Publishers of America, Inc., 604 So. 2d 459, 463 (Fla. 1992). With respect to any remedy, under the doctrine of stare decisis[2] this Court is bound by the Florida Supreme Court's decision of Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992).[3]

Civil Rights Claim

22. Newsweek's 42 U. S. C. § 1983 claim is barred because MPA's claim under 42 U. S. C. § 1983 was denied by an Order of this Court. A copy of the Final Order in Magazine Publishers of America, Inc., et al., v. State, Department of Revenue, Case No. 88-2442, (Fla. 2nd Jud. Cir. February 1, 1994), is attached to the Department's Request for Admissions, dated October 16, 1995. MPA appealed this order to the First District Court of Appeal, but subsequently withdrew its appeal.

23. This Court lacks jurisdiction over the subject matter because Newsweek has failed to state a claim upon which relief may be granted in this case in that:

(a) Newsweek is blocked by the very terms of § 1983, as 1983 only permits actions against "persons." A

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[2] See, State v. Dwyer, 332 So. 2d 333 (Fla. 1976).

[3] See also, Gasson v. Gay, 49 So. 2d 525 (Fla. 1950); State ex rel. Nuveen v. Greer, 88 Fla. 949, 102 So. 739 (1924); and, George W. Davis and Sons, Inc., v. Askew, 343 So. 2d 1329 (Fla. 1st DCA 1977).

state or a state agency is not a "person" within the meaning of § 1983. Will v. Michigan Department of State Police, 491 U. S. 58, 109 S.Ct. 2304, 2309-2310 (1989). See also, Howlett v. Rose, 496 U. S. 356, 110 S.Ct. 2430, 2437 (1990).

(b) The First District Court of Appeal has decided on three occasions that the State, state agencies and state officials acting in their official capacity are **not** "persons" under 1983. Arney v. Department of Natural Resources, 448 So. 2d 1041, 1045 (Fla. 1st DCA 1984) (the State and DNR, "an arm of state government" were not "persons" within the meaning of 1983); Hambley v. State, Department of Natural Resources, 459 So. 2d 408, 410 (Fla. 1st DCA 1984)(citing Arney); and, Witmer v. University of Florida Police Department, 610 So. 2d 87, 88 (Fla. 1st DCA 1992). The Department has not waived and hereby claims its sovereign immunity in this case.

(c) Finally, the United States Supreme Court recently held that 42 U. S. C. § 1983 provided no basis for courts - whether federal or state - to issue injunctive or declaratory relief in a state tax case when there is an adequate state remedy at law. National Private Truck Council, Inc., v. Oklahoma Tax Commission, ___ U. S. ___, 115 S. Ct. 2351, 2356 (1995)(copy attached). The Department can not be sued in either a Florida or Federal Court under 42 U. S. C. § 1983.

(d) Federal Courts have held that an aggrieved taxpayer has adequate remedies under Florida law. See, e.g.,

Osceola v. Florida Department of Revenue, 893 F. 2d 1231, 1233 (11th Cir. 1990).

(e) Therefore, this Court lacks jurisdiction over the subject matter. Since this Court has no jurisdiction to entertain a 42 U. S. C. § 1983 claim in a state court on a state tax matter, it has no jurisdiction to entertain a request for attorney's fees sought under 42 U. S. C. § 1988.

First Amendment Claim

24. Newsweek has failed to state a claim upon which relief may be granted because the application of sales tax to Newsweek does not constitute a discriminatory and impermissible burden on Newsweek's right to free speech. Leathers v. Medlock, 499 U. S. 439, 111 S. Ct. 1438, 1447 (1991); Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459, 461 (Fla. 1992).

The Comptroller

25. Although named as a party defendant, Newsweek has failed to allege any wrongdoing on the part of the Comptroller, nor does Newsweek seek any relief from the Comptroller.

26. The Comptroller has delegated to the Department of Revenue, pursuant to § 215.26(2), Fla. Stat., the authority to accept applications for the refund of taxes and to make determinations of the amount of refund due. See, Fla.

Admin. Code Rule 3A-44.020. Newsweek failed to allege that the Comptroller accepted a refund application or made a determination on the refund application at issue in the above styled case. Newsweek failed to state a claim against the Comptroller for which this Court may grant relief. Therefore, based upon the foregoing, the Department requests that this Court enter an Order dismissing the Comptroller as a party defendant in the present action.

Wherefore, the Department requests that this Court enter an Order granting the Departments' Motion for Summary Judgment.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/S
Jarrell L. Murchison
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of

foregoing has been sent by **HAND DELIVERY** to: **Mark E. Holcomb** and **James M. Ervin, Jr.**, HOLLAND & KNIGHT, 315 South Calhoun Street, Suite 600, Tallahassee, Florida 32301 this _____ day of November, 1995.

/S/
Jarrell L. Murchison
Assistant Attorney General

APPENDIX 3

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

NEWSWEEK, INC.,

Plaintiff,

v. CASE NO. 95-1971

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a state agency,
and-
LAWRENCE H. FUCHS, as
Executive Director of the
Department of Revenue of the
State of Florida,
-and-
ROBERT F. MILLIGAN, as
Comptroller of the State of Florida,
Defendants.

_____/

FINAL SUMMARY JUDGMENT

On November 29, 1995, the above styled case was heard before this Court on Plaintiff's Motion for Summary Judgment as to Count I of the Complaint and Defendants' Motion for Summary Judgment. This Court finds that there are no issues of material fact involved and that summary judgment is appropriate for this case. Having reviewed the documents, pleadings and memoranda of law filed in this case by the parties and having heard the arguments of counsel in this case, it is

ORDERED AND ADJUDGED

1. Plaintiff's Motion for Summary Judgment as to Count I of the Complaint is hereby denied.

2. Defendants' Motion for Summary Judgment, for the reasons, arguments and the authorities contained therein, is hereby granted.

3. Each side shall bear its own costs and attorneys fees.

4. Plaintiff shall take nothing from this action.

5. Defendants shall go hence without day.

DONE AND ORDERED this 12th day of April,

1996.

WILLIAM GARY
CIRCUIT COURT JUDGE

Copies furnished to:

Mark E. Holcomb & James M. Ervin, Jr.
HOLLAND & KNIGHT
315 South Calhoun St., Ste. 600
Tallahassee, FL 32301

Jerrell L. Murchison
Joseph C. Mellichamp, III, and
Eric J. Taylor
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, FL 32399-1050

APPENDIX 4

AFFIDAVIT

TO WHOM IT MAY CONCERN

This is to certify that the undersigned ROBERT H. KRONMILLER is the Chief, Bureau of Auditing, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, State of Florida. Affiant has earned a Bachelor of Science degree in accounting from the University of Florida. After four years as an accountant in private practice, Affiant accepted employment with the Bureau of Auditing, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, State of Florida, and has been for fifteen years continuously so employed. For the past three years Affiant has been the Chief, Bureau of Auditing.

During the period 1985-1988, Affiant was a Tax Audit Specialist 3, and was the number two person in the Bureau of Auditing of the Division of Alcoholic Beverages and Tobacco. Affiant reported to the Bureau Chief, Pedro M. Gonzalez, during the period 1985-1988.

As a Tax Audit Specialist 3, and as the number two person in the Bureau, Affiant was required to be familiar with tobacco and alcoholic beverage tax law, to include Chapters 85-203 and 85-204, Laws of Florida, which were subsequently codified in Sections 564.06 and 565.12, Florida Statutes (1985). Affiant is and was aware that these statutes establish basic tax rates per gallon of wine and distilled spirits. Affiant is and was further aware that these basic tax rates did not apply to wine or

distilled spirits manufactured from certain agricultural products designated in the statutes. The Legislature established lower tax rates for wine and distilled spirits manufactured from the designated agricultural products. The aforementioned statutes did not require that distributors carry the wine and/or distilled spirits manufactured from the agricultural products designated in the statutes, but rather provided a preferred tax rate to those distributors that opted to carry products manufactured from the designated agricultural products.

As a Tax Audit Specialist 3, and as the number two person in the Bureau of Auditing, Affiant was required to be familiar with procedures for reporting and collecting alcoholic beverage taxes, which procedures it should be noted, have changed but little since 1985. Section 561.50 and 561.55, Florida Statutes, require that the distributors prepare, on forms provided by the Division of Alcoholic Beverages and Tobacco, monthly reports of sales, from which the distributors compute their tax liability. The tax is remitted to the Division of Alcoholic Beverages and Tobacco, along with the monthly report, on or before the 10th of each month. Copies of the current forms provided to the distributors are attached. The substance of these forms has remained basically constant since 1985. The information on the forms, and the tax computed comes from the distributor who prepares the forms, and remits the tax to the Division of Alcoholic Beverages and Tobacco.

Affiant, as Bureau Chief, is also the custodian of the official records of the Bureau of Auditing of the Division of Alcoholic Beverages and Tobacco. Among the official records

in Affiant's custody are each monthly report from each distributor submitted during the period from July 1, 1985 through June 30, 1988. These monthly reports of the distributors were the bases for the decisions of the Division of Alcoholic Beverages and Tobacco regarding which distributors to assess, and the amount of each assessment. In early April, 1991, assessments were prepared and mailed, return receipt requested, to those distributors who dealt in preferred products. The assessments were computed from the distributors' monthly report as follows:

a. The amount of taxes due to the Division during the period July 1, 1985 through June 30, 1988, at the highest rate prescribed by Sections 564.06 and 565.12, Florida Statutes (1985), was determined;

b. Breakage, spoilage, revenue adjustments, and discounts were then subtracted from the figure described in paragraph a, supra; and

c. The assessment was determined by subtracting the actual taxes paid to the Division at the preferred rate, from the figure determined in paragraph a, supra, minus the breakage, spoilage, revenue adjustments, and discounts, as set forth in paragraph b, supra.

Copies of the assessments are submitted herewith as part of the Affidavit. The following assessed distributors are paying, or have paid their assessment:

1. Century Cellars, Inc.
2. International Wine and Liquor
3. Todhunter International

4. McKesson Wine and Spirits
5. Apex Distributing Company
6. Gulfside Distributors
7. R.M. Distributors, Inc.
8. Spearman Distributors
9. Sutton Distributing Company

The following assessed distributors received notice, did not challenge the assessment, and had not paid:

1. Florida West Coast Beverage Distributors, Inc. f/k/a/ Tampa Wholesale Companies:
2. Antares, Inc.
3. Gator Distributors, Inc., Fort Walton Beach;
4. Gator Distributors, Inc., Pensacola Florida;
5. Panama Beverage Company;
6. S.R. Perrot, Inc.;
7. Florida Brewery;
8. Fruit Wine/House of Midulla; and
9. Grantham Wine.

An assessment against Lafayette Vineyards and Winery, Inc. was prepared but not served due to an ongoing bankruptcy action. An assessment mailed to House of Midulla care of Tampa Wholesale in Ft. Myers was returned as being undeliverable. Finally, thirty-two distributors are challenging their assessments in the Circuit Court action.

To recapitulate, nine distributors have paid, or are paying their assessments; nine distributors received assessments which they neither paid nor challenged; one assessed distributor is in bankruptcy; one distributor's assessment was returned

undeliverable; and thirty-two distributors are challenging their assessments in circuit court.

FURTHER AFFIANT SAYETH NAUGHT.

ATTEST my hand and official seal this 20th day of May, 1992.

/S/
ROBERT H. KRONMILLER
CHIEF, BUREAU OF AUDITING
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO
Department of Business Regulation
725 South Bronough Street
Tallahassee, FL 32399-1007

Sworn to and described before me
this 20th day of May,
1992.

/s/
(Signature of Notary Public,
State of Florida)

Notary Public, State of Florida
Commission Expires Aug. 7, 1994

Janice S. Joanos
(Print, type or stamp commissioned
name of Notary Public)

Personally known _____ or
Produced Identification __X__
(Check One)

Type of Identification Produced:

State of Florida Drivers License

APPENDIX 5

Copyright (c) West Group 1997 No claim to original U.S. Govt. works

643 So.2d 16, Division of Alcoholic Beverages and Tobacco v. McKesson Corp., (Fla.App. 1 Dist. 1994)

*16 643 So.2d 16

19 Fla. L. Weekly D1958

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, Department of Business Regulation; and Office of theComptroller, State of Florida, Appellants/Cross-Appellees,

v.

McKESSON CORPORATION; Florida West Coast Beverage Distributors, Inc.; Grantham Distributing Company, Inc.; and Tampa Crown Distributors, Inc., Appellees/Cross-Appellants.

No. 93-1703.

District Court of Appeal of Florida,
First District.

Sept. 7, 1994.

Rehearing Denied Oct. 31, 1994.

Wholesaler liquor distributors brought separate actions challenging Florida excise tax which gave preferential treatment to alcoholic beverages manufactured from Florida agricultural crops and bottled in state. The Circuit Court, Leon County, Charles E. Miner, Jr., J., invalidated tax scheme on commerce clause grounds, but made its rulings perspective in

nature, and both sides appealed. Consolidating cases for purposes of appeal, the District Court of Appeal certified action to Supreme Court, which affirmed, 524 So.2d 1000. Certiorari was granted on petition of one of the distributors, and the Supreme Court, 110 S.Ct. 2238, reversed and remanded for further proceedings on petitioning distributor's available remedies. Following remand from the Supreme Court, 574 So.2d 114, the Circuit Court, P. Kevin Davey, J., granted second distributor's petition to appear, and state appealed. The District Court of Appeal, Ervin, J., held that, even assuming that nonpetitioning distributor was automatically deemed party to proceedings before United States Supreme Court, distributor had to take some further action in Supreme Court in order to preserve his entitlement to any relief which Supreme Court granted.

Reversed and remanded.

FEDERAL COURTS k507
170B ----
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk507 Right of review and parties.

Fla.App. 1 Dist. 1994.

Even assuming that taxpayer, whose case was consolidated on appeal with that of another taxpayer challenging Florida tax, was automatically deemed party to this other taxpayer's petition for writ of certiorari to the United States Supreme Court, first taxpayer had to take some further action in Supreme Court, by filing notice informing clerk of its continuing interest in case or

brief adopting second taxpayer's brief, in order to preserve its entitlement to relief granted by United States Supreme Court on second taxpayer's petition. U.S.Sup.Ct.Rule 12.4, 28 U.S.C.A.

***17** Jack L. McRay, Gen. Counsel, John B. Fretwell, Deputy Gen. Counsel, William B. Nickell, Asst. Gen. Counsel, Dept. of Business and Professional Regulation, Tallahassee, Robert A. Butterworth, Atty. Gen., Joseph C. Mellichamp, III, Sr. Asst. Atty. Gen., Eric J. Taylor, Asst. Atty., Office of the Atty. Gen., Tax Section, Tallahassee, for appellants/cross-appellees.

David G. Robertson and Paul T. Lufkin of Morrison & Foerster, San Francisco, CA, Charles Wachter and Thomas T. Steele of Fowler, White, Gillen, Boggs, Villareal & Banker, Tampa; M. Stephen Turner of Broad & Cassel, J. Riley Davis, Gary R. Rutledge and Paul Ezatoff of Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, Tallahassee, James L. Chase of James L. Chase, P.A., Richard A. Arnold and Scott E. Perwin of Kenny, Nachwalter, Seymour & Arnold, Pensacola, John D. Beasley of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, John McNeel Breckenridge, Jr. of The Breckenridge Group, Tampa, Geoffrey Todd Hodges and Gregory P. Hansel of Shackleford, Farrior, Stallings & Evans, P.A., Tampa, for Florida West Coast Beverage Distributors, Inc.

Michael P. McMahon and Virginia B. Townes of Akerman Senterfitt & Eidson, P.A., Orlando for Grantham Distributing Co., Inc.

Harold F.X. Purnell of Rutledge, Ecenia, Underwood and Purnell, P.A., Tallahassee, for Tampa Crown Distributors, Inc., for appellees/cross-appellants.

ERVIN, Judge.

Although numerous issues have been raised in this appeal, we conclude that as a result of agreements entered between appellant, the Division of Alcoholic Beverages and Tobacco, and various appellees, the only issue now requiring resolution is whether appellee Tampa Crown Distributors, Inc., retains

standing as a party to this appeal. Having decided that Tampa Crown has no interest remaining in the present litigation, we reverse the trial court's order granting partial summary judgment in Tampa Crown's favor and remand with directions that judgment be entered for the Division.

The history of this case is well documented in the numerous published opinions, to wit: Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla.1988) (McKesson I); McKesson Corp. v. Division *18 of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) (McKesson II); and Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 574 So.2d 114 (Fla.1991) (McKesson III). Consequently, this opinion summarizes only those facts necessary to our decision in the present appeal.

McKesson Corporation and Tampa Crown Distributors, licensed wholesale distributors of alcoholic beverages in Florida, separately challenged sections 564.06 and 565.12, Florida Statutes (1985), providing for preferential tax treatment to domestic distributors of alcoholic beverages manufactured from products grown in Florida. The trial court entered final and partial summary judgments in favor of Tampa Crown and McKesson, respectively, invalidating the discriminatory taxing scheme on Commerce Clause grounds, but made its rulings

prospective in nature, causing it to deny the distributors' tax refund requests. The Division appealed the Commerce Clause rulings, and Tampa Crown and McKesson cross-appealed the prospective application rulings. This court consolidated the two cases and certified the case to the Florida Supreme Court, which affirmed the trial court's rulings in McKesson I.

McKesson alone filed a petition for writ of certiorari in the United States Supreme Court, which agreed that the taxing scheme violated the Commerce Clause, but struck that portion of McKesson I which had granted only prospective relief. In order to provide McKesson with a clear and certain remedy for the past discrimination, the Court suggested the following three remedies: that the state refund McKesson the difference between the tax it had paid and the tax it would have paid had it received the preferential tax rate; that it assess and collect back taxes from McKesson's competitors which had benefited from the rate reductions; and, finally, that it consider a combination of a partial refund to McKesson and a partial retroactive assessment of tax increases on the favored competitors. McKesson II.

Following remand of the case to the Florida Supreme Court, the Division announced that it proposed to assess back taxes against all distributors which had received preferential tax treatment. The court thereupon remanded the case to the trial

court to determine whether the chosen remedy satisfied minimum constitutional requirements. McKesson III. Thereafter the Division implemented its policy decision by adopting emergency rules outlining the procedure for retroactively assessing and collecting taxes from McKesson's competitors which had benefited from the unconstitutional tax scheme. See 17 Fla.Admin. Weekly 1626-28 (Apr. 12, 1991) (Emergency Rules 7AER91-8 to 10). Tampa Crown filed a petition before the trial court on remand, seeking to appear in the proceeding on the ground that it was a party and would be substantially affected by the outcome. The Division opposed the petition, arguing that only those distributors which had retroactive tax assessments entered against them had standing to intervene, and that Tampa Crown, neither having sold any of the preferred products, nor assessed against it any back tax and seeking only a refund, lacked intervenor status. Additionally, the Division asserted that because Tampa Crown had not pursued an appeal to the United States Supreme Court, as had McKesson, McKesson I was res judicata insofar as Tampa Crown's claim for relief. Tampa Crown answered that it was clearly affected, because it was one of the parties that had been wrongfully discriminated against, and it was entitled, as was McKesson, to a clear and certain remedy. The trial court granted Tampa Crown's petition and allowed it to appear for the

limited purpose, within the confines of the Supreme Court's mandate, of presenting argument against the remedy chosen by the state. The question now before us concerns the propriety of the lower court's ruling.

Tampa Crown contends that it has standing based on United States Supreme Court Rule 12.4 (formerly known as rule 19.6). This rule, involving certiorari review, provides:

> All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below *19 has no interest in the outcome of the petition.

Initially, we question whether the above rule applies or whether rule 12.2, formerly known as rule 19.4, is applicable. Rule 12.2 states that parties who are "interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition." As explained in Supreme Court Practice Sec. 6.22 (7th ed. 1993), by Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, rule 12.2 is implicated once cases have been consolidated. The instant case appears to fall somewhere between the two rules; it involves separate suits and judgments brought in the trial court, which were thereafter consolidated in the appellate court, thereby suggesting the application of rule 12.2. The case also involves one proceeding

and one judgment in the Florida Supreme Court (McKesson I), hence implying the applicability of rule 12.4. If we were to apply the provisions of rule 12.2 to the instant case, Tampa Crown could not be deemed a party to the case filed in the United States Supreme Court, as it neither filed its own petition nor joined in McKesson's petition before the Court. As a result, it could not be considered a party to McKesson II, or McKesson III for that matter, and the decision in McKesson I holding the statutory taxing scheme unconstitutional, but making the decision prospective in its application, must be considered res judicata as to the rights of Tampa Crown. Thus, the resolution to the issue of Tampa Crown's standing to seek a refund turns on the applicability of rule 12.4.

Although rule 12.4 offers superficial support to Tampa Crown's position, we nevertheless conclude that Tampa Crown was required to take some affirmative act before the United States Supreme Court in order for its refund request to survive. Section 6.20 of Supreme Court Practice explains that rule 12.4 is applicable once the petitioner fails, either intentionally or accidentally, to name a party who was involved in the proceeding below and who still retains an interest in the case. Under this rule, any party before an inferior tribunal is automatically made a party before the Supreme Court without the necessity of such party filing any motion to be named or

added as a party. The authors point out, however, that the party should notify the clerk and any other parties that he or she has an interest in the outcome of the case and intends to participate as a party under rule 12.4. Although the rule provides that the unnamed party is assigned the role of respondent, regardless of that party's interest, he or she is free to file a response or brief appropriate to his or her position.

We have found no cases directly on point; however, after reviewing several of the cases cited in Supreme Court Practice, we conclude that even if Tampa Crown were automatically made a party under rule 12.4, in order for its claim for relief to prevail, Tampa Crown was required to take further action in the Supreme Court, by filing either a notice informing the clerk of its continuing interest in the case or a brief adopting McKesson's brief. See Stern, Gressman, Shapiro & Geller, Supreme Court Practice Sec. 6.20 (7th ed. 1993). For example, in Director, Office of Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297, 304 n. 12, 103 S.Ct. 634, 640 n. 12, 74 L.Ed.2d 465, 472 n. 12 (1983), the party that was made a respondent by virtue of rule 12.4 demonstrated its continued stake in the outcome by filing in support of the petitioner at both the certiorari and merit stages of the proceedings. In Washington v. Davis, 426 U.S. 229, 237 n. 7, 96 S.Ct. 2040, 2046 n. 7, 48 L.Ed.2d 597, 606 n. 7 (1976),

the party named respondent filed a brief pursuant to rule 12.4, and in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 263 & n. 12, 111 S.Ct. 2298, 2305 & n. 12, 115 L.Ed.2d 236, 251 & n. 12 (1991), the party designated a respondent under rule 12.4 filed a brief arguing its position. Similarly, in Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 140 n. 8, 108 S.Ct. 427, 430-31 n. 8, 98 L.Ed.2d 450, 458-59 n. 8 (1987), both an employee and his employer appeared before the United States Supreme Court as respondents pursuant to rule 19.6, and each actively participated, albeit on opposing sides.

***20.** Tampa Crown has not contended that it filed a petition with the United States Supreme Court or that it joined in McKesson's petition. Nor has it asserted that it did anything before the Supreme Court, such as filing a notice to assert its continuing interest, or a brief in support of McKesson's position. Finally, nothing in McKesson II discloses that Tampa Crown was either a petitioner or a respondent, and its attorney is not referenced. Under the circumstances, we conclude that Tampa Crown has failed to establish that it was a party before the Supreme Court in McKesson II, and, therefore, it has no entitlement to any of the possible avenues of relief which the Court outlined therein.

On this point, we found O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980), particularly instructive. That case involved the decertification of a nursing home as a provider under certain Medicare/Medicaid agreements with the Department of Housing, Education and Welfare (HEW) and the Pennsylvania Department of Public Works (DPW). The nursing home and six Medicaid patients thereafter filed an action in district court, claiming that they were entitled to an evidentiary hearing on the merits of the decertification before the Medicaid payments could be stopped. The proceedings culminated with an order in which, among other things, the court dissolved an injunction which had required HEW and DPW to continue the payments; however, HEW and DPW were required to pay for services which had actually been provided to the patients. The nursing home and patients appealed portions of the order adverse to them, while HEW cross-appealed that part requiring HEW and DPW to pay for actual services rendered. Although DPW was named as an appellee, it failed to take any action in the appeal. The Court of Appeals reversed that part of the order dissolving the injunction, thereby requiring HEW and DPW to continue paying Medicaid benefits until the patients were granted a hearing, and it affirmed that portion directing HEW and DPW to pay for the actual services provided. DPW then filed a

petition for certiorari to the United States Supreme Court. In footnote 14, the Court explained that because DPW did not cross-appeal the district court's ruling requiring it to make payments for actual services provided to the patients, it effectively accepted the court's directive. DPW's petition for certiorari, therefore, could not revive the issue of the propriety of that portion of the order. Id. at 783 n. 14, 100 S.Ct. at 2474 n. 14, 65 L.Ed.2d at 516-17 n. 14.

An analogy from the above case can be made to the facts in the instant case. Because Tampa Crown did not seek review in the United States Supreme Court of the Florida Supreme Court's decision making its rulings prospective, Tampa Crown must be considered to have accepted that decision and, therefore, to have no interest in any remaining litigation. As a consequence, the decision in McKesson I, which denied the distributors' refund requests by virtue of the prospective nature of its ruling, is res judicata as to Tampa Crown.

REVERSED and REMANDED with directions that judgment be entered for the Division.

WOLF and KAHN, JJ., concur.

APPENDIX 6

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF
FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

NEWSWEEK, INC.,

Appellant,

v CASE NO. 96-1882

DEPARTMENT OF REVENUE OF
THE STATE OF FLORIDA,
LAWRENCE H. FUCHS and
ROBERT F. MILLIGAN,

Appellees.

_____/

Opinion filed February 18, 1997.

An appeal from the Circuit Court
for Leon County.Judge William Gary.

Mark E. Holcomb, James M. Ervin, Jr.,
and Susan L. Turner of Holland & Knight,
Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General;
Jarrell L. Murchison and Eric J. Taylor,
Assistant Attorneys General;
Joseph C. Mellichamp, III,
Senior Assistant Attorney General,
Tallahassee, for Appellees.

BARFIELD, C.J.

Newsweek, Inc., appeals a final order in which the circuit court denied Newsweek's motion for summary judgment and granted the cross-motion for summary judgment of defendants Lawrence H. Fuchs, as Executive Director of the Department of Revenue, Robert F. Milligan, as Comptroller of the State of Florida, and the Florida Department of Revenue (collectively referred to as the Department), thereby denying Newsweek's request for a tax refund. Because we find no due process violation in the State's failing to provide a refund or other retroactive relief where Newsweek had an adequate predeprivation remedy, we affirm.

Effective July 1, 1987, the Legislature imposed a sales tax on newspapers and magazines. § 212.05(1)(i), Fla. Stat. (1987). Beginning January 1, 1988, the Legislature exempted newspapers from that tax. § 212.08(7)(w), Fla. Stat. (Supp. 1988). The retail sale of magazines remained subject to sales tax under section 212.05(1)(i), Florida Statutes (Supp. 1988). Magazine Publishers of America, Inc. (an association of which Newsweek is a member), and several individual publishers (but not Newsweek individually) challenged the constitutionality of this tax scheme. The trial court held the tax scheme unconstitutional, and that portion of the trial court's order was affirmed by the Florida Supreme Court in Department of Revenue v. Magazine Publishers of America, Inc., 565 So. 2d

1304 (Fla. 1990), cert. granted, judgment vacated sub nom. Miami Herald Pub. Co. v. Florida Dep't of Revenue, 499 U.S. 972 (1991). In its first opinion, the Florida Supreme Court held the relevant portions of chapter 212 invalid as violative of the First Amendment of the United States Constitution because it unconstitutionally differentiated between magazines and newspapers. The trial judge also ruled with Magazine Publishers that the appropriate remedy for this unlawful taxing scheme was to extend the exemption allowed newspapers by section 212.08(7)(w) to magazine publishers. The Supreme Court reversed that portion of the order, and ruled that the appropriate remedy was to strike the exemption enjoyed by newspapers and to apply the tax evenly. The United States Supreme Court granted certiorari and vacated the judgment for reconsideration in light of Leathers v. Medlock, 499 U.S. 439 (1991), in Miami Herald Pub. Co. v. Department of Revenue, 499 U.S. 972 (1991). On remand, the Florida Supreme Court again held the taxing scheme unconstitutional in Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992), affirming the ruling that the taxing scheme unconstitutionally violated the First Amendment because the discrimination between newspapers and magazines was content-based, but reversing the trial court's order to the extent that it held that magazines were entitled to the same exemption as newspapers. Again, the Florida Supreme Court explained that the Legislature had indicated its intent that the tax should

be imposed and that, if there was any invalidity in the taxing scheme, the exemption should fall rather than the tax. The Department has taxed both newspapers and magazines since December 9, 1990. See Fla. Admin. Code R. 12A-1.008(1)(a)(1994).

Newsweek filed a timely claim for a refund of sales tax paid between January 1, 1988, and December 9, 1990. That refund claim was denied on February 26, 1995. Newsweek then filed an action in circuit court, seeking the refund. Relying upon the holding of the Florida Supreme Court in Florida Dep't of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992), Newsweek's complaint alleged that the imposition of sales tax on magazines but not upon newspapers in the period between January 1, 1988, and December 9, 1990, was unconstitutional. Count I of the complaint claimed that Newsweek was entitled to a refund of sales tax paid in that interim under the Due Process Clauses of the United States and Florida Constitutions. Count II claimed that the denial of the refund violated section 1983 of Title 42 of the United States Code.[4] Newsweek moved for summary judgment on the basis

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[4]Newsweek has not appealed the circuit court's order granting summary judgment as to Count II. See Witmer v. University of Florida Police Department, 610 So. 2d 87, 88 (Fla. 1st DCA 1992)(affirming order granting motion to dismiss "to the extent it dismisses the section 1983 action against the state and its officers sued in their official capacity").

of Count I only, asserting that Due Process required retroactive relief as a matter of law. That motion was denied.

We must affirm if the trial court was correct for any reason. As the Florida Supreme Court explained in Chase v. Cowart, 102 So. 2d 147, 150 (Fla. 1958):

> Decrees and judgments in cases which come to an appellate court for review are presumed to be correct and free from error. We are required to uphold the lower court if valid grounds exist therefor. While the grounds or reasoning used by the trial court or chancellor are frequently helpful to an appellate court on review, they are not controlling. The decision of the appellate court must be made, not on the basis of whether the trial court or chancellor traveled the proper route, used proper reasoning, or laid his conclusion on proper grounds, but rather on whether his conclusion is correct or incorrect.

See also DSA Group, Inc. v. Gonzalez, 555 So. 2d 1234 (Fla. 2d DCA 1989); Whitney v. State, 184 So. 2d 207, 209 (Fla. 3d DCA)(applying "doctrine that even if the wrong reasons were given [but] the right result was obtained, the order here under review should be affirmed"), cert. denied mem., 192 So. 2d 490 (Fla. 1966), cert. dismissed, 389 U.S. 138 (1967).

The trial court correctly ruled that Newsweek is not entitled to a refund under the Due Process Clauses of the United States and Florida Constitutions. Newsweek relies upon the holding in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 31 (1990) that the Due

Process Clause requires "meaningful backward-looking relief" when a taxpayer is forced to pay a tax before having an opportunity to establish the unconstitutionality of that tax. Below the Department contended that McKesson is distinguishable because, while the liquor taxes at issue in McKesson were not encompassed within the procedures for predeprivation relief in chapter 72 of the Florida Statutes, the sales tax paid by Newsweek could properly have been contested in a predeprivation proceeding pursuant to section 72.011. We agree that McKesson is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful predeprivation remedy. The Court's holding was that states are obligated to provide a meaningful opportunity to secure postpayment relief when the state penalizes the taxpayer for failing to pay first and obtain review of the tax's validity later in a refund action. The penalties which the Supreme Court found coerced taxpayers into paying the tax before contesting the validity of the taxing scheme in McKesson included the possibility that the county sheriff could be directed "to levy upon and sell the delinquent taxpayer's goods and chattels to recover the amount of the unpaid tax plus a penalty of 50%, along with interest of 1% per month" as well as the possibility that the Division might revoke or decline to renew the distributor's license. McKesson, 496 U.S. at 38 n. 20.

In the present case, the taxpayer could have availed itself

of a predeprivation remedy under section 72.011, Florida Statutes (1987). Newsweek had the option of filing suit in circuit court to contest the legality of this tax and paying the amount of the contested tax into the registry of the court. See § 72.011(1), (3)(b). One who contests a tax and utilizes the procedure of paying the contested amount into the registry of the court cannot be said to have evaded the payment of the tax for purposes of liability for the penalty provided in section 212.12(2)(a), nor can the ultimate payment of such funds be considered "in jeopardy" for purposes of the provision in section 212.15(4) (under which a warrant may be issued for collection by the sheriff through levying upon the property of the taxpayer). The taxpayer retains the ownership of the funds paid into the registry of the court, as well as any interest earned on those monies. See Greco v. Tampa Wholesale Co., 522 So. 2d 506 (Fla. 2d DCA)(explaining that under Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) the funds deposited in the registry of the court did not become public funds, and that earnings thereon were an incident of the ownership of the funds), review denied mem., 531 So. 2d 168 (Fla. 1988), cert. denied mem., 488 U.S. 1006 (1989). Moreover, while section 28.33, Florida Statutes (1995) states, in pertinent part, that "[m]oneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk,. . . " the taxpayer also has the right to file a cash bond or surety bond in the amount of the contested

tax assessment, or to seek a court order approving an alternative arrangement. § 2.011(3)(b)2.; see also Don's Sod Co., Inc. v. Florida Dep't of Revenue, 661 So. 2d 896 (Fla. 5th DCA 1995). See generally Florida Dep't of Revenue v. Nu-Life Health and Fitness Center, 623 So. 2d 747 (Fla. 1st DCA 1992)(section 72.011 not an unconstitutional deprivation of access to courts, because the taxpayer has the alternative of seeking a waiver from the Department of the obligation to pay the contested tax into the registry of the court or to file a motion for court approval of an alternative security arrangment; also finding that there was no denial of access to courts because the taxpayer has the alternative of filing an administrative petition under chapter 120 without having to tender the amount of the contested tax). A taxpayer cannot reasonably be considered liable for penalties for availing himself of the procedure provided in chapter 72. See State ex rel. East Coast Lumber & Supply Co. v. Lee, 172 So. 722, 728 (Fla. 1937) (Davis, J., concurring). Thus, the coercive penalties which deprived the taxpayers in McKesson of any effective predeprivation remedy are not factors in this case. The taxpayers in McKesson were subject to onerous penalties if they did not pay the disputed tax before seeking a refund in a proceeding contesting the constitutionality of the tax. They had no predeprivation remedy because section 72.011 was not available to contest the liquor taxes at issue in that case; for that reason, McKesson is inapplicable.

Accordingly, we AFFIRM the order denying Newsweek's motion for summary judgment and granting final summary judgment to the defendants.

DAVIS, J., CONCURS WITH WRITTEN OPINION; BENTON, J., CONCURS IN RESULT WITH WRITTEN OPINION.

DAVIS, J., Concurring.

I agree with the decision holding that Newsweek's Due Process rights were not violated by the state's refusal to provide a refund or other retroactive relief to Newsweek. In addition, I believe there is a valid alternative basis for finding McKesson distinguishable and affirming the trial court. In McKesson, the taxpayers filed suit challenging the constitutionality of the taxing scheme and seeking a refund of the taxes paid pursuant to that scheme. The Supreme Court was required to consider the proper remedy for the constitutional violation established in that very case. In contrast, Newsweek asserts that it was not a party to the Magazine Publishers case in which the unconstitutionality of this taxing scheme was determined. Thus, the issue presented in the instant case is not the one found in McKesson (i.e.: the correct remedy to be afforded to the party who has established the unconstitutionality of the tax scheme), but rather whether the Magazine Publishers decision invalidating the tax scheme should be applied retroactively to justify a refund action by one who was not a party to the first case.

In American Trucking Ass'n, Inc. v. Smith, 496 U.S. 167 (1990), the Court held that taxpayers were not entitled to have an intervening case in which the unconstitutionality of a tax was decided applied retroactively to authorize refunds of the tax they had paid while the statute was believed to be valid. American Trucking explains that equitable considerations are relevant to the determination whether a decision should be applied retroactively. 496 U.S. at 179. Just as this court reasoned in Dryden v. Madison County, 672 So. 2d 840, 843 (Fla. 1st DCA), review granted mem., 678 So. 2d 338 (Fla. 1996), McKesson did not over-rule Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973) in which the court held that equitable considerations justified the denial of refunds of an unconstitutional tax. See also Martinez v. Scanlan, 582 So. 2d 1167, 1174, 1175 n. 7 (Fla. 1991) (citing both Gulesian and McKesson). The taxing scheme contested successfully in Magazine Publishers was facially content-neutral. It was invalidated because a rule promulgated by the Department of Revenue established that the statutory scheme was being applied discriminatorily based upon content in violation of the First Amendment. Magazine Publishers, 604 So. 2d at 461-62. Equitable considerations do not justify the retroactive application of the Magazine Publishers decision in refund actions brought by taxpayers who were not parties to the Magazine Publishers suit, based upon the fact that this statute was facially content-neutral as well as the Leathers v. Medlock,

499 U.S. 439 (1991) decision holding that distinctions in taxation between different types of media are not necessarily violative of the First Amendment.

BENTON, J., concurring in result.

I concur on the narrow ground that sections 72.011(1) and 120.575, Florida Statutes (1987), taken together, "provided a fair and meaningful predeprivation procedure," McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 38 n.21, 110 S. Ct. 2238, 2251, 110 L. Ed. 2d 17 (1990), which the taxpayer bypassed at its peril.

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Nothing in respondents' opposition weakens the case for this Court's review or supports the Florida District Court of Appeal's decision. Indeed, the opposition underscores the unexpected nature of the court's interpretation of Florida tax remedies and the pressing need for this Court's review. As petitioner showed in its petition for a writ of certiorari, the court below—according inappropriately cramped readings to this Court's due process decisions—denied petitioner a refund of an unconstitutional tax because it found a hitherto unknown predeprivation remedy available.

Respondents do not dispute the material contentions raised by the petition in this case. They do not deny that the predeprivation remedy found by the court below was unknown during the time the tax was due and paid. In-

deed, they emphasize that the Department of Revenue did *not* rely on the existence of any predeprivation remedy in rejecting petitioner's refund request, Op. Cert. 10; did *not* rely on the existence of any predeprivation remedy before the trial court, *id.* at 10, 12; and did *not* rely on the existence of any predeprivation remedy before the District Court of Appeal, *id.* at 14, 16. Likewise, respondents do not deny that the predeprivation procedure recognized by the court of appeal would subject taxpayers to financial sanctions. Respondents also do not deny that Florida's retund remedy *had* previously been available to all taxpayers, without regard to whether a predeprivation remedy existed. Finally, respondents do not quarrel with petitioner's statement that Florida's refund remedy, as it had always been interpreted, was mandatory and not within the unfettered discretion of state officials to grant or withhold.

Instead, respondents raise two points, neither of which is presented here, counsels against review, or justifies the decision below or Florida's unconstitutional actions.

1. Respondents argue that, as a matter of state law, petitioner was not legally entitled to pay the tax at issue but was required instead to pass it on to its customers. That state law issue was not a basis of the decision below. This is made clear not only by that court's discussion of the reasoning it did rely on, but also by the court's decision not to order the state to grant a refund. Had the court found that Newsweek was not entitled to pay the tax, it would have been required to order a refund on *that* ground, as would the Department of Revenue in the first instance. *See* Fla. Stat. § 215.26(1)(b) (refund provided for payment where no tax is due).[1]

2. Respondents' second argument is that petitioner's refund claim was barred as *res judicata*. Again, that question is not presented here because the court below did not rely on *res judicata* to reach the judgment at issue. Indeed, the court below expressly stated that its decision was premised on its conclusion that a predeprivation remedy existed. Thus, it explained: "Because we find no due process violation in the State's failing to provide a refund or other retroactive relief where Newsweek had an adequate predeprivation remedy, we affirm." Pet. App. 2a.

[1] Respondents' interpretation of state law is also incorrect, as the court below apparently concluded. Florida law prohibits sellers only from *advertising* that they will absorb a sales tax, Fla. Stat. § 212.07(4), Op. Cert. 22 n.10; it does not prohibit sellers from simply paying the tax. Newsweek did not advertise contrary to this provision, and has not been charged with doing so.

Respondents' argument to the contrary is based on enthusiastic bootstrapping from their own trial brief rather than on the opinion of the court below. Respondents optimistically interpret the trial court's summary order as a specific confirmation of each and every argument they made to that court. *See* Op. Cert. 24. Respondents do not overtly claim that the court of appeal's decision rested on *res judicata*. Rather, they simply assert, without explanation or support, that: "The denial was affirmed by the Florida district court of appeal on grounds having nothing to do with the issue here raised by Newsweek." Op. Cert. 15.

The grounds for the court of appeal's decision, however, as that court made clear, were its interpretation of Florida law to find a predeprivation remedy and its determination that due process under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco Dept.*, 496 U.S. 18 (1990), and *Reich v. Collins*, 513 U.S. 106 (1994), required no more. Pet. App. 2a, 6a-7a. Indeed, the court of appeal carefully distinguished its decision from the lower court's by explaining that it was required to affirm "if the trial court was correct for any reason"—not just the reasons relied on by the trial court. Pet. App. 4a. The only trial court conclusion the appellate court specifically accepted was that Newsweek was not "entitled to a refund under the Due Process Clauses of the United States and Florida Constitutions." Pet. App. 5a. The court of appeal did not even mention the doctrine of *res judicata*.

3. In any event, there was no proper *res judicata* ground for that court to rely on. It is undisputed that Newsweek was not a named party to the earlier suit, *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So. 2d 1304 (Fla. 1990), *vacated and remanded*, 499 U.S. 972 (1991), *aff'd on other grounds*, 604 So. 2d 459 (Fla. 1992). Even assuming *arguendo* that Magazine Publishers of America ("MPA") was Newsweek's virtual representative, it is not clear that MPA was itself a party to that suit. Although MPA was one of the five plaintiffs that brought the suit, Florida challenged MPA's right to bring suit, claiming that MPA did not meet the test for associational standing. *See* Answer of Florida Dep't of Revenue, Civ. No. 88-2442 (2d Cir., Leon County, filed July 25, 1988) (seventh affirmative defense). That dispute was never resolved because the other four plaintiffs were magazine companies, each of which independently had standing to challenge the constitutionality of the tax.[2]

It is also undisputed that the issue in question here—whether Newsweek is lawfully due a *refund*—was not litigated in the earlier action. As respondents concede, the plaintiffs in that action sought only two remedies: a declaration that the tax was unconstitutional and an injunction restraining the state from collecting the tax. Op. Cert 3. They "*did not request or seek a refund of the tax remitted on the sale of magazines in Florida*" for any MPA member. *Id.* at 4 (emphasis in original).

Thus, the litigated issue that respondents rely on to preclude Newsweek's refund claim was whether the appropriate *prospective* remedy for the unconstitutional tax was to withdraw the newspapers' exemption from tax or to extend that exemption to magazines. As respondents admit, what retrospective remedy is appropriate under state law was *not* litigated and *not* decided in the *Magazine Publishers* case. Therefore, even if MPA was a party to that suit, and even if MPA could be characterized as representing Newsweek's interests for purposes of *res judicata*, MPA at most represented only Newsweek's interest in having the tax declared unconstitutional, not its interest in obtaining a refund or other remedy for unlawful taxes already collected.

[2] The four plaintiffs with undisputed standing in that case were The Hearst Corporation; Time, Inc.; Golf Digest/Tennis, Inc., and Meredith Corporation. Newsweek was not a named plaintiff and did not intervene. *Accord* Op. Cert. 11.

Furthermore, MPA *could not* have represented Newsweek's interest in obtaining a refund. First, MPA did not have standing to seek that relief. Associations may not assert standing on behalf of their members when the claims at issue are specific to the individual members. *See Florida Home Builders Ass'n v. Department of Labor & Employment Security*, 412 So. 2d 351, 353 (Fla. 1982) (associational standing not available when individual members' claims for monetary relief are at issue); *see also Warth v. Seldin*, 422 U.S. 490, 515-16 (1975) (associational standing available when declaratory or injunctive relief sought but each member must be a party to a suit seeking monetary relief that is not shared by all members in equal degree).

Second, MPA would have been barred by the state's administrative exhaustion requirement. Refund suits are only available to taxpayers who have been denied refunds by the Department of Revenue. There is no reason to believe that Florida law would have permitted MPA to seek refunds from the Department of Revenue for its members, and in any event MPA had not requested refunds for Newsweek or any of its members and therefore had not received denials of any refund requests.

Third, Newsweek's claim for most of the refund at issue here had not even accrued when the earlier suit was brought. MPA and its co-plaintiffs filed suit on July 3,

1988. Newsweek sued for a refund of taxes paid throughout 1988, 1989, and most of 1990.[8]

Thus, respondents' *res judicata* argument is extraordinarily indifferent to taxpayers' constitutional rights. The Department of Revenue turned down Newsweek's refund claim and urged the courts below to affirm on the ground than the claim is precluded by an earlier suit in which Newsweek was not a party, the issue was not litigated, and the issue could not have been litigated. The court of appeal understandably declined to embrace this view. Had it done so, it would have run afoul of the due process clause in a different way. *See Hansberry v. Lee*, 311 U.S. 32 (1940); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

4. Nonetheless, respondents' opposition confirms two key points. First, Florida law, as interpreted by the court of appeal to provide a predeprivation remedy and to withdraw the state's refund remedy on that basis, was not only uncertain and unclear to taxpayers; it was unclear and uncertain to Florida's own Department of Revenue. Respondents' opposition confirms that even Florida's Department of Revenue did not think the state provided a predeprivation remedy to taxpayers before the decision below.

Second, the opposition confirms that Florida's Department of Revenue and its officers remain unremittingly hostile to taxpayers seeking relief from unconstitutional taxes. They still cling to the belief that taxpayers can lose their rights to refunds for unlawfully collected taxes by a decision in a case in which the taxpayers' claims were not and could not have been brought, even after that argument failed to persuade the state's own court of appeal. Further, it is clear from their continuing defense of their grounds for rejecting Newsweek's refund that they remain of the view that the due process clause does

[8] The prospective relief ordered in *Department of Revenue v. Magazine Publishers of America, Inc.* became effective December 9, 1990. Pet. App. 4a.

not generally require retrospective relief for unlawfully collected taxes.

Thus, respondents' opposition only reinforces the message from the court of appeal's decision. If those subject to taxes in Florida, and in similarly inclined states, are to enjoy the due process rights guaranteed by the United States Constitution, this Court's review is critical.

Accordingly, this case presents an excellent vehicle for addressing and resolving the due process questions presented by this petition: whether a predeprivation remedy is clear and certain if taxpayers had no notice that the remedy was available at the time the tax was due; whether a remedy comports with due process if it subjects taxpayers to any financial sanctions; whether a refund remedy that has consistently been interpreted as mandatory may be withdrawn after the tax has been paid. Because there is no dispute that the predeprivaiton remedy discovered by the court below did not exist prior to the decision in this case, because there is no dispute that the predeprivation remedy discovered by the court below would subject taxpayers to financial sanctions, and because there is no dispute that the refund remedy historically available in Florida was mandatory, the issues raised by the petition are squarely and cleanly presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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BRIEF AS *AMICUS CURIAE* OF COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONER

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BRIEF AS *AMICUS CURIAE* OF COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consents of the petitioner and respondents have been obtained and filed with the Clerk of the Court.*

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation (COST) is a non-profit trade association that was organized in 1969 as an

* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on January 1, 1992, has a membership of over 460 multi-state corporations engaged in interstate and international commerce. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities.

Many of COST's members are engaged in business in the State of Florida, and thus have a particular interest in the ultimate resolution of the remedial landscape in Florida, as well as other states. However, COST's concern transcends the issues associated with this case and relates to the national Due Process issues associated with remedial schemes in several other cases, including *General Motors Corp. v. Kansas City*, 895 S.W.2d 59 (Mo. Ct. App. 1995) *cert. denied*, 116 S. Ct. 277 (1995) (denial of refunds irrespective of the fact that the case presented nearly an identical fact pattern as the one this Court found unconstitutional in *Reich v. Collins*); and *Kerr v. Waddell*, 916 P.2d 1173 (Ariz. Ct. App. 1996) (tax refunds denied based on failure to comply with a subsequent procedural requirement). Therefore, COST has an interest in this case.

SUMMARY OF ARGUMENT

Florida provided a remedy which allowed the petitioner to pay the contested tax and seek subsequent relief. The respondent denied the petitioner this postdeprivation relief, finding instead that the petitioner should have availed itself of a predeprivation remedy. The respondent's denial of the petitioner's postdeprivation refund claim on the grounds that the taxpayer could have availed itself of a predeprivation remedy violates the Due Process Clause. In *Reich v. Collins*, 513 U.S. 106 (1994), this Court struck down an identical claim and held that a taxpayer could pursue a valid postdeprivation remedy regardless of the availability of a predeprivation remedy. The present case falls squarely within the reasoning of *Reich*, and thus the

availability or unavailability of a predeprivation remedy should be ignored in determining whether the petitioner is entitled to a refund of an illegally collected tax.

Further, the predeprivation remedy identified by the respondent and the Court of Appeal was *not* available to the petitioner, because the statutory predeprivation remedy did not, by its own terms, apply to the petitioner's factual situation or legal posture. By retroactively altering the availability of the predeprivation remedy, the respondent engaged in the type of "bait and switch" of remedies that this Court condemns. *Reich v. Collins*, 513 U.S. 106 (1994). Therefore, without a predeprivation remedy, the State was required to provide meaningful backward looking relief to rectify any unconstitutional deprivation. *Harper v. Virginia Dep't of Rev.*, 509 U.S. 86, 101 (1993).

Finally, even if the predeprivaiton remedy was available, it did not constitute a "clear and certain" remedy, as that standard has been articulated in this Court's prior decisions. *See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280 (1912); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). No taxpayer challenging the imposition of the sales and use tax has ever availed itself of this remedy. Therefore, the "average taxpayer" could not have concluded that the remedy was available. Thus, the alleged predeprivation remedy did not meet Due Process requirements.

ARGUMENT

I. ASSUMING *ARGUENDO* THAT THE STATE PROVIDED BOTH A PREDEPRIVATION AND A POSTDEPRIVATION REMEDY, THE RESPONDENT CANNOT SUBSEQUENTLY FORECLOSE THE REMEDIAL SCHEME THE PETITIONER SELECTED.

The respondent may not force the petitioner to select a predeprivation remedy when the State provided both predeprivation and postdeprivation remedies. This Court's

analysis in *Reich v. Collins*, 513 U.S. 106 (1994) is wholly applicable to the present case. The taxpayer in *Reich* paid a tax that was subsequently found to be illegally imposed. As a result, the taxpayer selected to pursue a postdeprivation remedy. The *Reich* Court held that the State could not offer the postdeprivation remedy and subsequently deny its availability after payment of the contested tax:

> [T]he Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these [predeprivation] procedures—an issue on which we express no view—no reasonable taxpayer would have thought they represented, in light of the apparent applicability of the refund statute, the exclusive remedy for unlawful taxes.

Reich, 513 U.S. at 113.

While the petitioner was subjected to the same fate as that of the taxpayer in *Reich* (*i.e.*, the offering of a remedy only to have it withdrawn), the Court of Appeal neglected to follow, or even mention, the *Reich* opinion in its decision.[1] This Court found in *Reich* that such State activity violates the Due Process clause contained in the Fourteenth Amendment to the United States Constitution. Had the Court of Appeal acknowledged the *Reich* holding, the court would have arrived at the same conclusion: the petitioner "was entitled to pursue what appeared to be a 'clear and certain' postdeprivation remedy, regardless of the State's predeprivation remedies." *Reich*, 513 U.S. at 113. Therefore, the availability of a

[1] While the Court of Appeal ignored the *Reich* decision, the court did, however, analyze and distinguish *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). However, the *McKesson* Court's holding did not address whether a State could withdraw a clear and certain postdeprivation remedy after payment of a contested tax.

predeprivation remedy is of no moment; the petitioner selected a valid postdeprivation remedy authorized by the State. According to this Court's jurisprudence, the State cannot subsequently inform the petitioner that it selected the wrong remedy.

II. THE SOLE REMEDY AVAILABLE TO THE TAXPAYER WAS POSTDEPRIVATION RELIEF.

This Court has held that a State "must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990). This Court's decisions make clear that States are granted wide latitude in crafting a method of providing taxpayers relief from an unlawfully collected tax. *McKesson*, 496 U.S. at 36. The State has the flexibility to provide an exclusively predeprivation remedial scheme, postdeprivation remedial scheme, or a hybrid of the two. *Reich v. Collins*, 513 U.S. 106, 110-11 (1994); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746-748 (1974).

However, the taxpayer in this case was not presented with a "meaningful predeprivation remedy," leaving the petitioner to pursue only postdeprivation relief.[2] In finding for the respondent, the Florida Court of Appeal held that the taxpayer could have availed itself of a predeprivation remedy contained in Fla. Stat. Section 72.011, allowing the taxpayer to file suit in circuit court to contest

[2] In fact, this Court has noted the compelling justifications for allowing States to offer only postdeprivation remedies. *McKesson*, 496 U.S. at 37 ("[a]llowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security"). However, where the state has elected to protect its fiscal security, this Court has held the State is constitutionally required to provide meaningful backward looking relief in the form of a postdeprivation remedy. *Harper v. Virginia Dep't of Rev.*, 509 U.S. 86, 101 (1993), *quoting McKesson*, 496 U.S. at 31 (footnotes omitted).

the legality of the tax and to pay the amount of the contested tax into the registry of the court. *Newsweek, Inc. v. Department of Rev.*, 689 So.2d 361, 364 (Feb. 18, 1997). The relief contained in section 72.011 is available in two instances: challenging the legality of an assessment and challenging the denial of a refund claim. Neither were available in the present case. The petitioner's payment of the tax negated the need for the respondent to issue an assessment. Further, the court's analysis presupposes that the petitioner was not required to pay the contested tax, negating the possibility of a refund request and subsequent denial. Therefore, the predeprivation remedy was not available to the petitioner.

For the Court of Appeal to identify the predeprivation remedy contained in section 72.011 as the sole avenue of recourse after the petitioner's payment of the tax is exactly the kind of "bait and switch" that this Court has previously struck down: "But what a State may not do . . . is to reconfigure its scheme, unfairly, in mid-course—to 'bait and switch,' as some have described it." *Reich v. Collins*, 513 U.S. 106, 111 (1994). The petitioner complied with the only remedial scheme available to it—paying the contested tax and requesting a refund. The respondent should be prevented from engaging in the post-payment reengineering of its remedy statutes that this Court explicitly denounced in *Reich*.

III. EVEN IF THE PREDEPRIVATION RELIEF WAS AVAILABLE TO THE PETITIONER, SUCH RELIEF DID NOT CONSTITUTE A "CLEAR AND CERTAIN" REMEDY.

Whatever approach a State chooses to provide taxpayers (predeprivation, postdeprivation, or a hybrid), the remedial scheme must be "clear and certain." *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280, 285 (1912). The Florida Court of Appeal held that the "sales tax paid by [petitioner] could properly have been

contested in a predeprivation proceeding pursuant to section 72.011." *Newsweek*, 689 So.2d at 363. In order for this or any predeprivation remedy to qualify as "clear and certain," it must "provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity." *McKesson*, 496 U.S. at 38. In determining whether a State provided a clear and certain remedy, this Court has inquired whether the "average taxpayer" would conclude that the remedy was available. *Reich*, 513 U.S. at 111.

Assuming *arguendo* that the predeprivation remedy was available to the petitioner, the petitioner was not afforded a "meaningful opportunity" to avail itself of the remedy. Neither the Court of Appeal nor the respondent identified a single instance in which a taxpayer challenging the imposition of the State's sales and use tax availed itself of the remedy provided by section 72.011. While a State can fashion a new remedy anytime it so chooses, it cannot retroactively wield a new remedy as a shield against a liability due under the existing postdeprivation remedial scheme. It is unlikely that the "average taxpayer" would contemplate that the remedy set forth in section 72.011 pertains to taxpayers challenging the validity of the State's sales and use tax. Therefore, the predeprivation remedy that the Court of Appeal identified and relied upon as the exclusive remedy for the first time cannot be construed as "clear and certain" under this Court's prior decisions.

CONCLUSION

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Florida Court of Appeal.

Respectfully submitted,

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NEWSWEEK, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS, AND ROBERT F. MILLIGAN,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONER

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Brief by Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Guam, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondent, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992) (No. 91-615) 17

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BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, nonprofit association of

[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Tax Executives Institute has received the written consents of the Petitioner and Respondents to the filing of this brief; those consents have been filed with the Clerk of the Court.

corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,000 members who represent nearly 2,800 of the leading businesses in the United States and Canada, nearly all of which are engaged in interstate commerce.

The members of the Institute represent a cross-section of the business community in North America. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Due Process and other constitutional rights of business taxpayers. As tax professionals who recognize the States' right to collect properly levied taxes and who respect the legitimacy of State assessments, our members have a significant interest in the standards applied in assessing the adequacy of remedies accorded taxpayers for unconstitutionally imposed and collected state taxes.

This case raises fundamental questions about the remedies available for taxpayers who have paid state taxes that are subsequently found to contravene the Constitution. In *Reich v. Collins*, 513 U.S. 106 (1994), the Court held that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and then declare, after taxpayers have paid the disputed tax, that no such remedy exists.

This case focuses—once again—on the obstacles a State may constitutionally erect to deny taxpayers a refund of illegally collected taxes. Specifically, the issue is whether the State of Florida has improperly "reconfigure[d] its scheme, unfairly, in midcourse"—to "switch" disingenuously to a cry of inapplicability after

having "bait[ed]" taxpayers into believing that a refund remedy exists. *Reich*, 513 U.S. at 111.

The Instiute's members and the businesses by which they are employed have a keen and vital interest in ensuring the efficacy and effectiveness of remedies provided to taxpayers who are subjected to unconstitutional state taxation. Given the checkered history of Florida and other States on this issue, this case promises to affect far more than the State of Florida's authority to retain the unconstitutional taxes improperly exacted from the Petitioner. *Amicus* TEI is concerned about the deleterious effect the Florida court's decision could have on the equitable administration of other States' taxing schemes relating to business taxpayers.

Because TEI members and the businesses by whom they are employed will be materially affected by the application and the aftermath of the Florida court's decision, the Institute has a special interest in the outcome of this case.

SUMMARY OF ARGUMENT

The core issue in this case is whether taxpayers who have been subjected to an unconstitutional tax are entitled to refunds of the illegally extracted monies. Historically, taxpayers who have mounted successful challenges to state tax statutes have had the improperly collected tax refunded to them. Beginning in the 1980s, however, taxpayers who in good faith had paid their taxes (often in reliance on the protection of refund statutes) have found themselves consigned to the role of Sisyphus. No matter how far up the mountain they rolled the "stone" of their refund claims, the State haughtily claimed that it was not far enough and pushed the stone down the mountainside.

The last decade and a half has seen a disturbing number of state taxing statues—including more than one of Florida's laws—invalidated on constitutional grounds.

Even after the statutes were voided, some States resisted efforts to refund the taxes that they had collected under the invalidated laws—first on grounds the substantive decision should be given prospective-only effect and then on grounds the taxpayer failed to abide by the affected State's procedural requirements. In *Reich v. Collins*, 513 U.S. 106 (1994), the Court sought to stem this tide. It squarely addressed the issue of remedy, declaring that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and subsequently declare, after taxpayers have paid the disputed tax, that the remedy is inapplicable to the case at hand. The instant case reprises this question of remedy—a question the Court undoubtedly thought it had resolved by declaring in *Reich* that the States may not resort to "bait and switch" tactics. *Reich*, 513 U.S. at 111.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990), this Court stated that, to satisfy the requirements of due process, the State must provide an aggrieved taxpayer either with a pre-deprivation hearing (without placing the taxpayer seeking such a hearing under duress) or with "meaningful backward-looking relief." That relief, the Court said, must be "clear and certain." *Id.* at 39. On its face, the State of Florida's statutory refund scheme comports with this procedural requirement. This case is before the Court, however, because the court below vitiated the existing remedy, finding first that the refund statute was inapposite and further that Florida law provided a constitutionally sufficient pre-deprivation remedy. In doing so, the court ignored the clear language of Florida's refund statute, as well as more than 50 years of precedents holding the law applicable to unconstitutionally collected taxes.

In *Reich*, the Court voiced its repugnance at the State's "bait and switch" tactics and ordered meaningful backward-looking relief. 513 U.S. at 111. Nevertheless, the Florida court here refused to order a refund to the taxpayer and its refusal is precisely the type of "mischievous consequences" that the Court warned of 130 years ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). Stated bluntly, like the State of Georgia in *Reich*, Florida here endeavors to shoehorn Newsweek into a refund scheme that, by its very terms, will deny it relief. It is clearly one with the reconfiguration that the Court found objectionable in *Reich*. 513 U.S. at 113.

This Court is properly loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. In the past decade and a half, State after State has distended this Court's holdings —on the merits, on the retroactivity question, and now on the issue of remedies—in order to eviscerate the protections accorded taxpayers by the Constitution. The Court "cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967). Unless the Court reviews this case and mandates meaningful relief, the States will continue to have an incentive to enact unconstitutional statutes, knowing that, at worst, they may have to mend their ways in the future.

It is time for this Court to say that enough is enough. It is time to reject the States' beguiling interpretations of state law, distended readings of the Constitution, and facile efforts to vitiate the Court's mandates. It is time to say, once again, that "[t]he time for toleration has come to an end." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).

The Court should grant a writ of certiorari, reverse the decision of the District Court of Appeal of Florida, and order the State to refund the taxes it unconstitutionally imposed on the Petitioner.

ARGUMENT

I.

The core issue in this case is whether taxpayers who have been subjected to an unconstitutional tax are entitled to refunds of the illegally extracted monies. Historically, taxpayers who have mounted successful challenges to state tax statutes have enjoyed the fruits of their labors: Upon securing judicial affirmation of a tax's invalidity, they had the improperly collected tax refunded to them. This historical practice not only squared with the American sense of fairness (essentially restoring the aggrieved taxpayers to the position they would have occupied had the improper tax not been levied in the first instance), but it encouraged taxpayers to pay suspect taxes and then challenge them (rather than recalcitrantly refusing to pay). Hence, the practice was not only just in a philosophical sense, but it provided the State with a stable funding source during the pendency of the litigation. This practice was built on trust—on the notion that, if what the State did is found to be improper, it will not be the compliant taxpayers who suffered.

Beginning in the 1980s, many States sought financial gain in routinely breaching this bedrock trust. The "end" of collecting (and keeping) revenues seemed to justify the "means" of first imposing a discriminatory tax and then, upon its invalidation, depriving aggrieved taxpayers of the only true remedy—refunds—by engaging in the governmental equivalent of three-card monte. Trust was supplanted by cynicism. Taxpayers who in good faith had paid their taxes (in reliance on explicit refund statutes and the aforementioned historical practice) found themselves consigned to the role of Sisyphus. No matter how far up the mountain they rolled the "stone" of their refund claims, the State haughtily claimed that it was not far enough and pushed them down the mountainside.

Is it any wonder that with growing frequency taxpayers are heeding the call of "don't pay, don't pay, don't pay"—

because they fear that if they abide by the rules by paying the tax and then suing for refunds, they may be denied a true remedy?[2] Is it any wonder that when the State violates the rules of fair play, the people lose faith in the State and, equally important, in the worth of the rules themselves? Is it any wonder that, having forestalled an explicit mandate from this Court that refunds be automatically paid when taxes have been unconstitutionally imposed and collected, the States continue in their defiance, depriving compliant taxpayers such as the Petitioner here of their tax refunds? Regrettably, it is no wonder at all.

To paraphrase Shakespeare, without a refund taxpayers' rights are illusory and without regard.[3] The last decade and a half has been a disturbing number of state taxing statutes—including more than one of Florida's laws—invalidated on constitutional grounds.[4] Moreover, even

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[2] As the Court recognized in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the States have a vested financial interest in encouraging taxpayers "to make timely payments prior to resolution of any dispute over the validity of the tax assessment." 496 U.S. at 37. Denying refund claims under a statute that had heretofore been considered applicable could serve to encourage taxpayers to resist payment and undermine compliance in general. *See* Philip M. Tatarowicz, *Right to Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues under the Commerce Clause*, 41 TAX LAW. 103, 143 (Fall 1987).

[3] WILLIAM SHAKESPEARE, MACBETH act 3, sec. 2, line 11 ("Things without all remedy/Should be without regard: what's done is done.").

[4] *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984) (West Virginia's business and occupation tax); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (Hawaii's exemption of local products from the liquor excise tax); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (Alabama's tax on foreign insurers); *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987) (Washington's business and occupation tax); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987) (Pennsylvania's highway use tax); *Davis v. Michigan Dep't of*

after the statutes have been voided, some States resisted efforts to refund the taxes that they had collected under the invalidated laws—first on grounds the substantive decision should be given prospective-only effect and then on grounds the taxpayer failed to abide by the affected State's procedural requirements. That the States have moved from defending constitutionally deficient laws to pleading for prospectivity to distending their remedial statutes should not obscure this basic truth: Even if the disputes began as a good-faith argument over a statute's constitutionality, they are ending with the States' refusal to pay over funds properly belonging to taxpayers. This pattern of misbehavior should be stopped.[5]

Treasury, 489 U.S. 803, 814-15 (1989) (Michigan's tax on federal retirees' pensions); *McKesson*, 496 U.S. at 22 (Florida statute exempting local products from liquor excise tax); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647-54 (1994) (Missouri's supplemental use tax). *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 532 (1991) (involving the retroactivity of a decision striking down a Georgia statute); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (involving the retroactivity of the *Davis* case); *Reich v. Collins*, 513 U.S. 106, 114 (1994) (same).

[5] After this Court struck down Hawaii's liquor tax exemption for local products in *Bacchus Imports, Ltd.*, 468 U.S. at 273, as violative of the Commerce Clause, the Florida legislature acknowledged that its own local product exemption was invalid. In spite of this admission, the Florida legislature resisted compliance with this Court's mandate and required a subsequent decision from this Court before deigning to comply. *See McKesson*, 496 U.S. at 46. Indeed, although the named plaintiff in *McKesson* settled with the State of Florida, similarly situated taxpayers (including some who joined in challenging the statute in the lower courts) have been consistently denied relief during the intervening seven years. *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 643 So. 2d 16, 19-20 (Fla. Dist. Ct. App. 1994), *cert. denied*, 514 U.S. 1083 (1995). *See also General Motors Corp. v. City of Kansas City*, 895 S.W.2d 59 (Mo. Ct. App.), *cert. denied*, 116 S. Ct. 277 (1995) (new interpretation of law applied to deny taxpayer a refund for unconstitutionally collected taxes); *Swanson v. North Carolina*, 441 S.E.2d 537 (N.C. 1993) (procedure that did not permit taxpayers to challenge a tax before payment nonetheless held to satisfy due process requirements and bar taxpayers' refunds).

Over the years, the States' refusal to fashion meaningful remedies has been rationalized on equity grounds. Hence, many States argued that the balancing test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), could be applied to safeguard the constitutional rights of taxpayers, while protecting the financial interests of the States. Experience convinced this Court, however, that the *Chevron Oil* standard was too pliant, enabling too many States to construe it in a "heads I win, tails you lose" manner. Consequently, in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), this Court embraced the full retroactivity standard of *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).[6] One year later, in *Reich v. Collins*, 513 U.S. 106 (1994), the Court squarely addressed the issue of remedy, declaring that a State may not hold out what plainly appears to be a "clear and certain" post-deprivation remedy—its tax refund statute—and subsequently declare, after taxpayers have paid the disputed tax, that the remedy is inapplicable to the case at hand.

The instant case reprises the question of remedy—a question the Court undoubtedly and hopefully thought it had resolved by declaring in *Reich* that the States may not resort to "bait and switch" tactics. *Reich*, 513 U.S. at 111.[7] The State of Florida has not learned the lesson of *Reich*. Rather than refunding the unlawfully collected taxes, it has engaged taxpayers in a game of remedy roulette in which it has repeatedly changed the rules to ensure the house always wins.

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[6] *Grffith* holds that new rules for the conduct of criminal prosecutions must apply retroactively to all pending or non-final cases, even if they constitute a "clear break" with the past. 479 U.S. at 328. *Harper* extends the rule to civil cases. 509 U.S. at 99.

[7] *See Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment"); *Reich*, 513 U.S. at 114.

II.

In 1992, the Supreme Court of Florida struck down as unconstitutional the State's discriminatory scheme for imposing sales tax on magazines but not on newspapers. *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992).[8] The court granted injunctive relief by striking down the exemption from tax for newspapers. 604 So. 2d at 463-64. Relying upon sections 72.011 and 215.26 of the Florida Statutes, FLA. STAT. §§ 72.011 & 215.26 (1987), *reprinted at* Appendix E to Newsweek, Inc.'s Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District (App.) at App. 13a-16a, Newsweek timely filed a claim seeking a refund of the taxes paid into the State treasury.[9] The relief the company sought—full refund of the legally collected taxes—is consistent with what had been the longstanding policy of the State of Florida. That policy was articulated by the state supreme court more than 50 years ago, as follows:

> A reading of the quoted acts in full declares a policy to make complete restitution to any citizen who (1) overpays any tax, license, or account, (2) pays when no tax or license is due, and (3) pays any tax or account into the State Treasury in error. . . . Our conclusion on this point is also supported by the well settled rule of tax statute construction that, if the text does not reveal with certainty the intent of the Legislature and it is susceptible of two meanings, *that meaning most favorable to the taxpayer should be adopted.*

Walgreen Drug Stores Co. v. Lee, 28 So. 2d 535, 536 (Fla. 1946) (emphasis added). Equally important, the

[8] The Florida court held that the tax violated the First Amendment of the U.S. Constitution. 604 So.2d at 462-63.

[9] The availability of refunds for the taxes unconstitutionally collected under the voided statute was not directly at issue in the *Magazine Publishers* case.

procedure under section 215.26—according the taxpayer a just result—has long been available to those seeking refunds of taxes paid under unconstitutional statutes. *E.g., State ex rel. Hardaway Contracting Co. v. Lee*, 21 So. 2d 211 (Fla. 1945).

A half century of laudatory experience notwithstanding, the court below did not grant Newsweek relief. Indeed, the court did not even acknowledge the force of the cited cases but instead contorted the applicable statutes to deny the company's refund claims. *Newsweek, Inc. v. Department of Revenue of the State of Florida, Lawrence H. Fuchs, and Robert F. Milligan*, No. 96-1882 (Fla. Dist. Ct. App. Feb. 18, 1997), *reprinted at* Appendix B to Newsweek, Inc.'s Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District (App.) at App. 6a-7a. Specifically, the court facilely held that Newsweek had the option of using a predeprivation statute to contest the legality of the tax by paying the monies into the court registry. *Id.* In doing so, the court resisted the plain reading of the statute that requires an *assessment* of tax before that procedure may be used. FLA. STAT. § 72.011(1) (1987), *reprinted at* Appendix E to Newsweek, Inc.'s Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District (App.) at App. 13a.[10] The court also disregarded case law interpreting the staute in a taxpayer-favorable manner. *Florida Export Tobacco Co. v. Department of Revenue*, 510 So. 2d 936, 942 (Fla. Dist. Ct. App. 1987). Finally, it ignored Newsweek's having the choice—at least until the decision below was rendered—between (1) using the pre-

[10] In point of fact, Newsweek could *not* use the predeprivation statute on its face because the company had paid the tax when due and therefore there was no assessment from the Department of Revenue. FLA. STAT. § 72.011(2) at App. 13a ("No action may be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) after 60 days from the date the assessment becomes final."). Thus, the procedure was not available until Newsweek's refund claim was denied.

deprivation procedure under section 72.011 and (2) paying the tax and suing for a refund under section 215.26 of the Florida Statutes.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45-46 (1990), this Court stated that, to satisfy the requirements of due process, the State must provide an aggrieved taxpayer either with a predeprivation hearing (without placing the taxpayer seeking such a hearing under duress[11]) or with "meaningful backward-looking relief." 496 U.S. at 31. The Court also acknowledged that the State might constitutionally require that the challenged taxes be paid under protest or, alternatively, that refund claims be filed within a specified period of time. *Id.* at 45. In other words, "a State need not provide [a] predeprivation process for the exaction of taxes." *Id.* at 37 (footnote omitted).[12] To be meaningful—and constitutionally sufficient—however, the taxpayer's remedy must be "clear and certain." *Id.* at 39 (*quoting Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912) (Holmes, J.)).

On its face, the State of Florida's statutory scheme comports with the procedural requirements enunciated in *McKesson* by providing what seemed to be a "clear and certain" refund procedure. This case is before the Court,

[11] The Court explained that "when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure." 496 U.S. at 38 n.21. The sanctions in *McKesson* included a warrant for seizure and sale of the taxpayer's property, a 50-percent penalty, and interest of 1 percent per month. *Id.* at 38 n.20. Newsweek faced almost identical sanctions here (although the penalty rate is 25 percent).

[12] Indeed, the Court explained why States could properly decide not to allow taxpayers to litigate their tax liabilities prior to payment: Such a procedure could "threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." *Id.* (footnote omitted).

however, because the court below vitiated that remedy, finding first that the refund statute was inapposite and further that Florida law provided a constitutionally sufficient predeprivation remedy. That predeprivation remedy, however, was not even a glimmer in the State of Florida's eyes until after the sales tax was declared unconstitutional.

Even assuming that the Florida procedure would not place the taxpayer under duress (which would by itself undermine the supposed sufficiency of the predeprivation remedy), can such a patchwork—concocted by the State several years after the taxes were paid—satisfy the requirement that the taxpayer's remedy be "clear and certain"? *Amicus* TEI submits that to pose the question is to answer it. The purpose of the Due Process Clause is to protect individual rights against arbitrary action by the government, but what is more arbitrary than inventing and interposing new requirements after the time for satisfying those requirements has passed? At best, the predeprivation remedy was inchoate when Newsweek paid the challenged taxes; at worst, it was conjured out of thin air long after the fact.

In *Reich*, the Court held that a State may not "reconfigure its scheme, in midcourse"—to "bait" taxpayers into believing that a refund remedy exists, only to "switch" later by claiming its inapplicability. This is because stealth remedies—playing "gotcha" with taxpayers—are not consonant with due process. States must treat their citizens fairly; they may not lull taxpayers into paying a tax—believing that a "clear and certain" post-deprivation remedy exists, in the form of a tax refund statute—only to declare after those taxes have been paid that no such remedy exists. *See* 513 U.S. at 111. The Florida court's refusal to order a refund in this case is precisely the type of "mischievous consequences" that the Court warned of 130 years ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

Stated bluntly, like the State of Georgia in *Reich*, Florida here endeavors to shoehorn Newsweek into a refund scheme that, by its very terms, will deny it relief. The court below parsed Florida's refund statute and analyzed the other provisions of the Florida statutes, not in search of principle or justice, but for a loophole. By remedy legerdemain, it sought to emasculate the Court's mandates in *McKesson* and *Reich*—to render them hollow—rather than to vivify them. That the action of the court below might pass muster under federal due process principles truly beggars the imagination.[13] In *Reich*, this Court refused to permit "bait and switch" tactics by the State of Georgia. It should invoke the same rationale here, grant a writ of certiorari, and reverse the decision of the Florida court.

III.

This Court is properly loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351, 2364 (1995) ("principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration"). *Reich* stands for the proposition, however, that the States' remedial discretion is not unfettered, especially where that discretion has been repeatedly abused. History is irrefutable: In the past decade and a half, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and now on the issue of remedies

[13] *See McKesson*, 496 U.S. at 39 (if a tax is beyond the State's power to impose, the State has no choice but to "undo" the unlawful deprivation by making refunds "because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'" (*quoting Ward v. Board of Comm'rs of Love County*, 253 U.S. 17, 24 (1920)).

—in order to eviscerate the protections accorded taxpayers by the Constitution.

Two centuries ago, the Framers recognized the need for the federal courts to vigilantly safeguard rights against the parochialism of the States. In *The Federalist No. 80*, Alexander Hamilton used the example of claims to land under grants of different States to underscore the need for diversity jurisdiction:

> The courts of neither of the granting states could be expected to be unbiassed. The laws may have even prejudged the question and tied the courts down to decisions in favour of the grants of the state to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

THE FEDERALIST No. 80 (Alexander Hamilton), *reprinted in* II THE DEBATE ON THE CONSTITUTION 476, 479-80 (Library of America 1993). Justice Story elaborated in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816):

> The constitution has presumed (whether rightly or wrongly we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.[14]

See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948) (diversity jurisdiction was the product in part of "[t]he desire to avoid regional prejudice against commercial

[14] *See* THE FEDERALIST No. 81 (Alexander Hamilton), *reprinted in* II THE DEBATE ON THE CONSTITUTION, *supra*, 483, 487-88 ("The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes. . . .").

litigants, based in small part on experience and in large part on common-sense anticipation.").

To be sure, the insularity of the States has generally tempered over the years, and the concerns that led to the development of diversity jurisdiction are not wholly present here. Nevertheless, the principle remains the same. The Court "cannot leave to the States the formulation of the authoritative laws, rules, *and remedies designed to protect people from infractions by the States of federally guaranteed rights.*" *Chapman v. California*, 386 U.S. 18, 21 (1967) (emphasis added).

It is time for the Court to end its willing suspension of disbelief concerning the States' commitment to protect the constitutional rights of business taxpayers. The States should not be permitted to thwart the judgments of this Court by creating one excuse after another for refusing to return to taxpayers what the States had no right to take in the first instance.[15] Unless the Court mandates *meaningful* relief—the immediate refund of the unlawfully collected taxes—the States will continue to have an incentive to enact unconstitutional statutes—to "roll the dice" with

[15] Nor should the States be able to avoid paying refunds by holding open the possibility of retroactively taxing the beneficiaries of discriminatory taxing schemes (for example, the newspapers that benefitted from the unconstitutional sales tax exemption here) when in practice they have not taken one step toward imposing such a compensating tax. *See McKesson*, 496 U.S. at 51 ("Florida may satisfy this obligation [to provide a 'clear and certain remedy'] through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination . . . ."). Ironically, States have viewed the Court's decision in *McKesson* not as providing them with a false choice (what politician would seek to impose a retroactive tax on his or her own citizens or businesses in order to cure the constitutional harm done to out-of-state citizens or businesses?), but as giving them license to avoid the only remedy truly consonant with the Constitution (immediate refunds).

the constitutional rights of taxpayers, knowing that, at worst, they may have to mend their ways in the future.[16]

In the final analysis, then, this case is about more than Newsweek's entitlement to the tax dollars that the State of Florida illegally extracted from the company. It is about the legitimacy and vitality of this Court's decisions.

[16] That the States' approach in the cases invalidating state taxing schemes is driven more by their desire to avoid responsibility for their unconstitutional acts than by a reasonable interpretation of this Court's decisions is perhaps best illustrated by a case in which the roles of taxpayers and the States on the retroactivity issue were reversed from what they typically have been. In *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992), the Court considered whether two earlier decisions—*ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982)—should be overruled. Had those cases been overturned, the States would have been free to tax a larger share of the income of out-of-state businesses, and the Court invited briefs on whether any such overruling should be retroactive. Although the case would have involved the overruling of express and directly applicable Supreme Court precedent of less than ten years' duration (which itself relied on an unbroken chain of Supreme Court decisions dating back to 1875)—and notwithstanding the States' almost uniform resistance to retroactive holdings where taxing schemes have been invalidated—29 States, the District of Columbia, Guam, and the Virgin Islands filed a brief unabashedly arguing that "the *Chevron Oil* test can accommodate both an overruling decision and a holding of retroactivity." *See* Brief by Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Guam, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondent, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992) (No. 91-615) at 16. Such an "accommodation," however, which some States seem ready to carry over to the issue of remedy, seems completely untethered by principle or consistency. As the Fifth Circuit observed in *Kurzner v. United States*, 413 F.2d 97, 112 (5th Cir. 1969), "the courts have not yet become so cynical as to subscribe to the tax-dollar school of statutory construction."

To be sure, the States pay lip service to *McKesson*, *Harper*, and *Reich*, but in reality they have shown a brazen disregard for the Supremacy Clause, and an unbending willingness to thwart the directives of the Court and to undermine the protections of the Constitution.

It is time for this Court to say that enough is enough. It is time to reject the States' beguiling interpretations of state law, distended readings of the Constitution, and facile efforts to vitiate this Court's mandates. It is time to halt their efforts to treat taxpayers' constitutional rights as unwelcome guests at a dinner party, thinking that if they simply ignore them, they will go away. It is time to say, once again—and to demonstrate by the force of its decision—"[t]he time for toleration has come to an end." *Griffith v. Kentucky*, 479 U.S. at 323 (*quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)).

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari, reverse the decision of the District Court of Appeal of Florida, and order the State to refund the taxes it unconstitutionally imposed on the Petitioner.

Respectfully submitted,

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November 14, 1997

SUPREME COURT OF THE UNITED STATES

NEWSWEEK, INC. *v.* FLORIDA DEPARTMENT OF REVENUE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 97–663. Decided February 23, 1998

PER CURIAM.

Effective January 1, 1988, Florida exempted newspapers, but not magazines, from its sales tax. See Fla. Stat. §§212.08(7)(w), 212.05(1)(i) (Supp. 1988). In 1990, the Florida Supreme Court found this classification invalid under the First Amendment of the Constitution of the United States. See *Department of Revenue* v. *Magazine Publishers of America, Inc.*, 565 So. 2d 1304 (1990), vacated and remanded, *Miami Herald Publishing Co.* v. *Dept. of Revenue*, 499 U. S. 972 (1991), reaff'd, 604 So. 2d 459 (1992). In the wake of this ruling, Newsweek, a magazine, filed a claim for a refund of sales taxes it had paid between 1988 and 1990. See Fla. Stat. §215.26(1) (Supp. 1998) ("'The Comptroller of the state may refund . . . any moneys paid into the State Treasury").

When the Department of Revenue denied the refund, Newsweek filed suit, alleging the State's failure to accord it retroactive relief violated its due process rights under *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18 (1990). The Florida trial court granted summary judgment against Newsweek, and the District Court of Appeal affirmed. Although acknowledging *McKesson*'s requirement of "meaningful backward-looking relief" when a taxpayer is forced to pay a tax before having an opportunity to establish its unconstitutionality, the District Court of Appeal held: "*McKes-*

son is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful predeprivation remedy." 689 So. 2d 361, 363 (1997). The court interpreted Florida law to permit prepayment tax challenges by filing an action and paying the contested amount into the court registry, posting a bond, or obtaining a court order approving an alternative arrangement. See *id.*, at 363-364 (citing Fla. Stat. §72.011 (1987)). The court concluded Newsweek was afforded due process because it could have pursued this prepayment remedy without suffering onerous penalties. See 689 So. 2d, at 364.

The District Court of Appeal's decision failed to consider our decision in *Reich* v. *Collins*, 513 U. S. 106 (1994). There, the Georgia Supreme Court had rejected a taxpayer's refund claim filed pursuant to a general refund statute, dismissing any due process concerns because a predeprivation remedy was available. See *id.*, at 110. While assuming the constitutional adequacy of Georgia's predeprivation procedures, we nonetheless reversed because "no reasonable taxpayer would have thought that [the predeprivation procedures] represented, in light of the apparent applicability of the refund statute, the exclusive remedy for unlawful taxes." *Id.*, at 111 (emphasis deleted). Until the Georgia Supreme Court's ruling, the taxpayer had no way of knowing from either the statutory language or case law that he could not pursue a postpayment refund and was relegated to a predeprivation remedy. See *id.*, at 111-112. We emphasized a State "has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is 'clear and certain.' " *Id.*, at 110-111. But a State may not "bait and switch" by "hold[ing] out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Id.*, at 111, 108.

Under Florida law, there was a long standing practice of

permitting taxpayers to seek refunds under §215.26 for taxes paid under an unconstitutional statute. See, *e.g.*, *State ex rel. Hardaway Contracting Co.* v. *Lee*, 155 Fla. 724, 21 So. 2d 211 (1945). At Florida's urging, federal courts have dismissed taxpayer challenges, including constitutional challenges, because §215.26 appeared to provide an adequate postpayment remedy for refunds. See Tax Injunction Act, 28 U. S. C. §1341 ("The district courts shall not enjoin . . . any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State"); see, *e.g.*, *Osceola* v. *Florida Dept. of Revenue*, 893 F. 2d 1231, 1233 (CA11 1990); *Rendon* v. *State of Fla.*, 930 F. Supp. 601 (SD Fla. 1996). This Court, too, has interpreted Florida law to provide a postpayment remedy. See *McKesson*, *supra*, at 24, n. 4 ("It appears . . . Florida law does not require a taxpayer to pay under protest in order to preserve the right to challenge a remittance in a postpayment refund action"). The State does not dispute this settled understanding. The effect of the District Court of Appeal's decision below, however, was to cut off Newsweek's recourse to §215.26. While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.

Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures to adjudicate the merits of its claim. We grant the petition for a writ of certiorari, vacate the judgment, and remand for proceedings not inconsistent with this opinion.

It is so ordered.